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JUDGES

OF THE

PROBATE, DIVORCE, AND ADMIRALTY DIVISION

OF

THE HIGH COURT OF JUSTICE

1950

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CASES

DETERMINED BY THE

PROBATE, DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

Applied. WHITNEY v. WHITNEY [1951] P. 250

BARTRAM *v.* BARTRAM.

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June 29, 30.

Bucknill, Asquith, and Denning L.JJ.

Distinguished. VINEY v. VINEY [1951] P. 457

Divorce—Desertion of husband by wife—Wife on account of lack of accommodation, returning to live under same roof as husband, but as if a lodger—No reconciliation—Period of desertion continues.

A resumption of cohabitation, after desertion by one spouse, must mean resuming a state where a matrimonial home is again set up and that involves a bilateral intention on the part of both spouses so to set up that home.

Where a wife, who has deserted her husband (i.e., both in intention and, in fact, by living separately from him) for some years, goes to live under the same roof as her husband, only because there is no other accommodation within reach of her work, which was that of a school teacher, but refuses to sleep with her husband and never goes to his rooms, mends his clothes, cooks for him, or goes out with him, although at times she sits at the same table as does her husband for meals, the desertion continues and will continue, unless and until there is a bilateral intention on the part of both spouses again to set up a matrimonial home together. The mere fact that as a lodger she comes to live under the same roof as her husband, because she has nowhere else to go, does not prevent the continuance of the desertion.

Per Denning L.J. To hold otherwise would greatly hamper attempts at reconciliation. In such a case, the period of desertion

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does not cease to run, unless and until a true reconciliation has been effected.

Mummery v. *Mummery* [1942] P. 107, followed.
Hopes v. *Hopes* [1949] P. 227, distinguished.

APPEAL from a judgment of his Honour Judge Carey-Evans, who, sitting as a special commissioner, had refused to grant a decree of divorce to a husband on the ground, alleged by the husband, of his wife's desertion for the period of three years immediately preceding the date when the petition was filed—i.e. November 24, 1948. The wife did not defend the petition or appear either before the commissioner or the Court of Appeal.

The parties married on August 5, 1932, and there was no issue of the marriage. The wife was a school teacher at Wymondham, Norfolk, from 1932 to 1937, when at her husband's request she stopped teaching until 1939. Then, on the outbreak of war, she resumed that work. Up to 1943 the spouses lived at a house called " Penlan," in Wymondham. In that year the husband left " Penlan " for business reasons which seemed to be adequate, and went to live at a house in Farland Street, where also lived his mother and her adopted daughter. The wife, who had said that she was not like an ordinary woman and hated sexual intercourse, refused to leave " Penlan " for the Farland Street house, not because she disliked her mother-in-law, nor because she disliked that house, nor because it was less convenient for her work, but because she did not want to have anything more to do with her husband. She steadily refused his entreaties to move and live with him.

In February, 1947, i.e. some twenty months before November, 1948, the husband sold the house " Penlan," where his wife was still living, with a view to forcing his wife to come and live with him. There was no other accommodation at Wymondham within reach of her work and, as the wife wished to continue to teach at the school, she went to live at Farland Street. She lived there until September, 1948, when she went to Northampton to teach at another school.

At Farland Street there were (besides bedrooms) two large living-rooms, a kitchen, and the usual offices. The wife refused to sleep with her husband and slept with the adopted daughter of her husband's mother. She never went into his rooms. She paid no attention at all to him as a husband, never mended his clothes, cooked for him, or went out with him. She never treated him in any way differently from the way she would treat a lodger whom she disliked. At times, however, she sat at the same table with her husband and ate the common food provided for them.

The commissioner found that the wife deserted her husband in 1943 and continued in desertion for some considerable time into the period of three years from November 24, 1945, to November 24, 1948. But he held that the state of desertion was broken as from February or March, 1947, when she went to live at Farland Street. He did not consider the case was distinguishable from *Hopes* v. *Hopes* (1), because of the earlier period of desertion from 1943 to February, 1947. The petitioner, he said, had failed to prove the fact of separation throughout the statutory period of three years and he refused a decree.

The husband appealed.

Redmond Barry K.C., and *F. T. Alpe* for the husband. The commissioner held that the desertion of the wife, which he found existed, both in intention and in fact, from 1943 onwards, was terminated in February or March, 1947, when she was forced by the sale of the house "Penlan," to live where the husband lived in the house at Farland Street, practically as a lodger, since there was no other accommodation in Wymondham within reach of her work as a school teacher. In this view the commissioner was wrong, since there was no resumption of the matrimonial home or bilateral intention on the part of both spouses to set up such a home. See *Mummery* v. *Mummery* (2) and *Everitt* v. *Everitt* (3). The commissioner misdirected himself as to the effect of the decision in *Hopes* v. *Hopes* (1). In that case, it was plain that though the wife desired to desert her husband she had, in fact, never done so, since they remained living in the same household. It was held, therefore, that in that case there was no desertion. In the case before the court, the commissioner found that there had been an original desertion commencing in 1943 and the issue was whether it had been terminated in February or March, 1947. On the authorities already cited it was not terminated.

The wife did not appear.

(1) [1949] P. 227.
(2) [1942] P. 107.
(3) [1949] P. 374.

BUCKNILL L.J. The question which this court has to decide is whether the fact that the wife lived in the same house as the husband during these eighteen months ended the desertion which had started in 1943, and had gone on for some considerable period of the requisite three years. I think that on the whole the judge accepted the husband's evidence. There is a passage in his judgment where he said that he thought there was some slight exaggeration as to the precise number of times when they had meals in the same room, but he did not think that was of much importance. I will quote from the crucial passage in his judgment: "Now I quite "agree with Mr. Alpe's reference to *Mummery* v. *Mummery* (1) "which I interpret in this connexion in this way. I think "some very brief interlude in a desertion may not be sufficient "to break a period of desertion, but I think when they went "on living in this manner for practically half the statutory "period of desertion, March, 1947, to September, 1948, it is "impossible to say that they were within the principle of "*Hopes* v. *Hopes* (2), living in fact, separately, during these "eighteen months or so. That would really conclude the "matter, but for an additional argument of Mr. Alpe's which "I must mention. He says I ought to find there was desertion "in 1943, and that the case is distinguishable from *Hopes* v. "*Hopes* (2), because of this prior desertion. I think that on "the evidence I must hold that in 1943 the parties were "living separately, and the wife had got a deserting mind, "and the husband wanted her back, and she was guilty of "desertion, but it does not alter the fact, so it seems to me, that "the husband must prove at any rate the fact of separation "throughout the statutory period of three years, and I cannot "myself see that it makes any difference to the fact whether "they were living in one household or two, whether prior to "that date, February, 1947, she had been guilty of desertion "or not. To my mind it does not make any difference at all. "Obviously, it might make a great difference if one was "inquiring into a question of intent, but I have already said "I am satisfied on that aspect of the case. The difficulty "in this case is whether they were living separately and that "is all there is to the matter. I quite appreciate that the "husband has behaved quite well. He has tried to get her "back and she has not stood by him as a wife ought to, but "as Denning L.J. has pointed out, gross neglect or chronic

(1) [1942] P. 107. (2) [1949] P. 227.

"discord is not a ground for divorce, though desertion is, "and I quite appreciate that apparently both parties want the "divorce to go through, but I am not entitled to grant a "divorce unless the conditions of the Act of Parliament are "complied with, merely because it appears both spouses "would like to have one."

With great respect to the learned judge I do not think that he has given sufficient weight to the essential difference between this case and that of *Hopes* v. *Hopes* (1). I will not refer to the judgments in *Hopes* v. *Hopes* (1), because, for the purposes of this case, it is more convenient to refer to the comments which Lord Merriman P. made on that case when he himself was presiding in the Court of Appeal (after *Hopes* v. *Hopes* (1) had been decided) in the case of *Everitt* v. *Everitt* (2). Lord Merriman said (3): "The "fundamental point about this part of the case is that it was "decided by this court in *Hopes* v. *Hopes* (1) that the necessary "element of separation cannot subsist when a husband and "wife are living under the same roof, unless they have ceased "to share one household and have set up two households "there." In conjunction with that passage, I may refer to another passage in a judgment also delivered by the learned President in *Mummery* v. *Mummery*, where he said (4): "Similarly, I doubt whether any judge could give a com-"pletely exhaustive definition of cohabitation, and certainly "I am not going to attempt to do so, but at least a resumption "of cohabitation must mean resuming a state of things, that "is to say, setting up a matrimonial home together, and that "involves a bilateral intention on the part of both spouses "so to do." In *Hopes* v. *Hopes* (1) the husband failed to prove his case because he never succeeded in proving desertion. He never proved that there was any actual separation of husband and wife, although he did prove the intention on the part of the wife to desert. Therefore, the case failed at the threshold.

But, in the present case, the husband has established actual desertion by the wife for many months. That being so, it seems to me that the husband is entitled to say that the desertion, once established, continues until it is proved that it has been brought to an end. The wife did not suggest at any time that she had brought it to an end. The question is, do the facts proved establish that it was brought to an end? In my view, it can only be brought to an end if the facts show an intention on the part of the wife to set up a matrimonial home with the husband—quoting the words of the President in the two cases to which I have referred. If the facts do not establish any intention on the part of the wife to set up a matrimonial home, the mere fact that, as a lodger, she came to live under the same roof as her husband, because she had nowhere else to go, does not remove the desertion which she had already started and which continued to run.

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(1) [1949] P. 227.
(2) [1949] P. 374.
(3) Ibid. 387.
(4) [1942] P. 107, 109.

For these reasons, in a case which is not free from difficulty, when one considers the decisions of the Court of Appeal to which Mr. Barry has referred us, I think the husband has established desertion for the requisite three years, and that a decree ought to be granted in his favour. I, therefore, think that this appeal should be allowed.

ASQUITH L.J. This seems to me a borderline case of very great difficulty, but for the reasons given by my Lord, I also have come to the conclusion that he has expressed, and I think that the appeal ought to be allowed.

It is clear that the husband, by selling the original matrimonial home "Penlan" over the wife's head, meant to force her, and did succeed in forcing her, to leave that house and to go to Farland Street, which was the only other accommodation available within reach of her work. Having regard to those and other proved circumstances in the case, it seems to me wrong to hold that the three years' period was interrupted by any resumption of cohabitation, for such resumption involves, in the language of Lord Merriman, P. in *Mummery* v. *Mummery* (1) cited by my Lord, a bilateral intention on the part of both spouses to set up a matrimonial home together. In my view, the facts proved in this case negative any such intention on the part of the wife who was not a free agent, but was acting under the spur of necessity. For these reasons, and for the reasons given by my Lord, I agree that this appeal should be allowed.

DENNING L.J. The decision in *Hopes* v. *Hopes* (2) does not apply, because here the period of desertion had begun to run before the parties came to live together again under the same roof. Once the period of desertion has begun to run,

(1) [1942] P. 107.

(2) [1949] P. 227.

it does not cease to run simply because the parties attempt a reconciliation and for that purpose come together again for a time. That was laid down by Lord Merriman P. in *Mummery* v. *Mummery* (1) and has never been doubted since. Indeed, I would say in such a case the period of desertion does not cease to run unless and until a true reconciliation has been effected. Any other view would greatly hamper attempts at reconciliation, because it would mean that the deserted party would be disinclined to take the other back for fear of losing his legal rights in case the attempt at reconciliation was unsuccessful.

It was held in *Pratt* v. *Pratt* (2) that it was the duty of the husband to respond to a reasonable offer of reconciliation, and if so, he should not be penalized for so doing. In *Everitt* v. *Everitt* (3), as I understand it, the period of desertion was held to have ceased to run because the letter left by the wife was strong evidence that there had been a reconciliation. Nothing short of that, however, will suffice.

Applying those principles to this case, the judge found that in 1943 the wife was guilty of desertion. The only question is whether that period ceased to run in 1947 and 1948, when the parties were living in the same house. The evidence shows that the husband was very willing to effect a reconciliation, but the wife had never any intention to go any way to meet him as she told her solicitor. She discovered that she was a woman who should never have been married; she had a complete abhorrence of all questions of sex and regarded them as purely animal. She went to the house in 1947 merely as a lodger, and that is all she was. There was clearly no true reconciliation. See *Mackrell* v. *Mackrell* (4). I agree that the appeal should be allowed.

BUCKNILL L.J. A decree nisi will be granted as from today

Appeal allowed.

Solicitors for the husband: *Ford, Michelmore, Rose and Binning for Greenland, Houchen & Co., Norwich.*

(1) [1943] P. 101.
(2) [1939] A. C. 417.
(3) [1949] P. 374.
(4) [1948] 2 All E. R. 858.

C. G. M.

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May 31; *June* 1, 2.

Bucknill, Cohen and Asquith L.JJ.

EDWARDS *v.* EDWARDS

Divorce—Desertion—Conduct short of "cruelty" may justify spouse in leaving matrimonial home, if of grave character.

Conduct of "a grave and convincing character," but short of cruelty or other matrimonial offence, may afford cause for desertion.

Russell v. *Russell* [1895] P. 315; [1897] A. C. 395; and the judgment of Lord Greene M.R. in *Buchler* v. *Buchler* [1947] P. 25, followed.

Judgment of Hodson J. in *Barker* v. *Barker* [1949] P. 219, explained.

APPEAL from a decision of Mr. Grazebrook K.C. sitting as a Commissioner in Divorce.

The parties married in 1921. The wife was a widow aged 41 with three daughters and a son and the husband a widower aged 35 with one son. There were no children of the marriage.

The husband filed his petition for divorce in 1948 alleging desertion without cause by his wife in 1930. By her answer the wife alleged cruelty both physical and mental in that he had struck her on many occasions and, between the years 1923 and 1930, he had associated with other women. She also pleaded that if she had deserted her husband in 1930 the desertion had been terminated in 1931 when, on two occasions, her husband had sexual intercourse with her. She also alleged desertion by her husband in 1932 and by her prayer asked for a judicial separation. It was proved that during 1928 and 1929 the wife had left her husband for periods, but on each occasion had returned. In 1930 she left him and she did not return to the house. The husband admitted that he had committed adultery with a Mrs. Jaques on two occasions in July, 1931, and asked for exercise of the court's discretion.

The commissioner found that the wife had failed to prove "cruelty," but that she had proved a course of conduct by the husband which justified her in leaving him in 1930. Accordingly, the wife had not deserted her husband without cause. He also said that he was not satisfied that intercourse took place between the parties in 1931. He rejected the wife's prayer for a judicial separation saying that he was not satisfied that the husband had deserted his wife in 1932. Further, the wife had not made the claim for seventeen years; it was a case of unreasonable delay and in these

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circumstances he ought not to grant the wife a decree of judicial separation.

The husband appealed, but the wife did not appeal, so that the sole question for the court was whether the commissioner was wrong in dismissing the husband's petition for desertion.

Silkin for the husband. The commissioner found that there was a course of conduct by the husband which justified the wife in leaving him in 1930. But he had found that the wife had failed to prove the matrimonial offence of "cruelty" and, that being so, in law he could not find that the wife was justified in leaving her husband in that year. There was, therefore desertion by the wife. In *Barker* v. *Barker* (1) Hodson J. said: "Dealing with conduct which is either "cruelty or not cruelty, it is, in my view not open to any "court to say: 'this is not cruelty but it is so near it that it "'amounts to a grave and weighty matter justifying separa-"'tion'." In this case the commissioner was dealing with conduct which was either cruelty or not cruelty, and what he has said is that the conduct, though not cruelty is so near it that it amounts to a grave and weighty matter justifying separation.

Secondly, the commissioner was wrong in holding that there were sufficient grounds to justify the wife in leaving her husband. [Counsel argued on the facts disclosed by the evidence.]

Lastly, if there were sufficient grounds for the wife leaving the husband, then the husband was guilty of constructive desertion and the wife should have succeeded in her claim for judicial separation.

Reader Harris for the wife: The commissioner's judgment is right. He has found as a fact that the wife was justified in leaving her husband in 1930. The reason for her leaving was her husband's violence towards her which the commissioner found did not amount to "cruelty." But violence short of cruelty can constitute such a grave and weighty matter as to justify a spouse in withdrawing from cohabitation: see *Butland* v. *Butland* (2). If Hodson J. in *Barker* v. *Barker* (1) is to be taken as saying that nothing short of the matrimonial offence of cruelty is sufficient to afford cause for desertion that is in conflict with the decision of the Court of Appeal in *Buchler* v. *Buchler* (3) and is wrong. It is a question of law whether the acts complained of are capable of constituting "just cause," and if they are so capable it is a question of fact in any particular case whether they are of a sufficiently "serious and convincing nature" (per Lord Greene M.R. in *Buchler* v. *Buchler* (1)) as to amount to just cause.

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(1) [1949] P. 219, 226.

(2) (1913) 29 T. L. R. 729.

(3) [1947] P. 25.

Here there was ample evidence, if the commissioner accepted it, to support his conclusion that the husband's course of conduct in effect drove the wife from the house. The husband denied that he had ever struck his wife at all but the commissioner, finding as he did, must have disbelieved that and substantially accepted the wife's story. As between the wife and the husband, the commissioner found the wife the more reliable witness and this court ought not to disturb his findings. (He was stopped.)

Silkin replied.

BUCKNILL L.J. The first and main issue, so far as this appeal is concerned, is whether the commissioner was wrong in deciding that the husband had not made out his case of desertion. On that question he said: "Then comes the "question of the wife leaving her husband, which is on a "somewhat different footing because in regard to that it "would not be necessary for her to have to prove cruelty; it "would be necessary for her to prove some course of conduct "which justified her in leaving her husband. There again "I am satisfied that she did leave her husband by reason of "some treatment of his, and I am satisfied to that extent "that she was justified in leaving him; but events sub-"sequently to a great extent wipe out any matter of complaint "that she had at that time, because I am satisfied also in "regard to the subsequent period, that the wife's story is "nearer the truth than the husband's in regard to subsequent "events."

On that, counsel for the husband, as I understand his argument, has put forward three points. The first is one of law, namely that, on the judgment of Hodson J. in *Barker* v. *Barker* (2), it was not open to the commissioner to find that the wife had justification for leaving her husband, once he had decided that he was not satisfied that the case of cruelty alleged by the wife had been made out. The second point was that, on the facts, the commissioner was wrong in holding that there were sufficient grounds to justify the wife in leaving.

(1) [1947] P. 25.

(2) [1949] P. 219.

The third point was, that the commissioner's judgment was illogical because, if there were sufficient grounds for the wife to leave the husband, then the husband himself was a constructive deserter and, that being so, the wife ought to have succeeded in her plea for a judicial separation on the ground of the husband's desertion.

As regards the first point, I will refer to two cases before considering the judgment of Hodson J., in *Barker* v. *Barker* (1). The first is the very well-known case, *Russell* v. *Russell* (2), referred to in the judgment of Hodson J. The facts in *Russell* v. *Russell* (2) were very shortly these: the wife petitioned for a decree of restitution of conjugal rights on the ground that the husband had left her. He in his answer pleaded that he had good grounds for leaving her in that she made an unfounded charge of an unnatural offence committed by him. He also asked in his answer for a decree of separation on the ground of her cruelty. In the result, both pleas failed. The husband failed in his plea for a judicial separation on the ground of his wife's cruelty, because he failed to establish that her conduct had injured his health or was likely to injure it. She failed in her plea for a restitution of conjugal rights because it was held that her conduct was such as to justify him in living away from her. Lopes L.J. said (3) "By s. 16 of the Matrimonial "Causes Act of 1857 desertion is for the first time made a "ground for judicial separation, and is not governed by the "old ecclesiastical law; but it is no ground for a sentence of "judicial separation unless the desertion is without cause. "If the wife were petitioning for a judicial separation here "on the ground of desertion against her husband, her conduct "towards him would disable her from contending that the "desertion was without cause, and she would fail in her suit." It is plain that the Lord Justice is there saying in effect that the husband has failed to make out a case of cruelty against the wife, but that nevertheless her conduct towards him would prevent her from contending that the desertion was without cause. In other words, there can be sufficient cause for desertion which falls short of legal cruelty.

The second is *Oldroyd* v. *Oldroyd* (4), decided by Gorell Barnes J., before *Russell* v. *Russell* had reached the House of Lords. Gorell Barnes J. said (5): "The effect of that case"—that is, *Russell* v. *Russell* (2)—"appears to be that in cases where

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(1) [1949] P. 219.
(2) [1895] P. 315; [1897] A. C. 395.
(3) [1895] P. 315, 334.
(4) [1896] P. 175.
(5) Ibid. 184.

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"the conduct of the petitioner has led to desertion by the "respondent, and has amounted to sufficient cause to dis-"entitle the petitioner to maintain a suit for judicial separation "on the ground of desertion, the court is now empowered to "refuse to pronounce a decree compelling the respondent to "return to cohabitation with the petitioner. The truth is "that in such cases it has become practically impossible for "the spouses to live properly together." Those two cases lay down that proposition of law.

In *Buchler* v. *Buchler* (1), the question arose what conduct on the part of a husband justified a wife in refusing to live with him and then to set up a plea of constructive desertion. Lord Greene M.R. said (2): "The crucial matter for "consideration, therefore, is the nature of the conduct relied "upon as equivalent to an expulsion of the complaining "spouse. It must, I think, be accepted that the acts "sufficient to satisfy this test must be of a serious and "convincing nature. Sir Valentine Holmes on behalf of the "husband submitted that nothing short of a matrimonial "offence such as cruelty or adultery would suffice and he "pointed out that even in the case of adultery some more "flagrant conduct beyond the mere commission of adultery "had always been present in the reported cases. But he "eventually found himself compelled to agree that conduct "short of an actual matrimonial offence might be sufficient. "In this I agree with him. But the necessary conduct must, "from the very nature of the offence of desertion, obviously "be of a grave and convincing character. Whether in any "given case this requirement is fulfilled is, I think, a question "of fact upon which a jury would require to be carefully "directed. It would be for the judge to say whether the "facts were capable of being regarded as equivalent to an "expulsion from the matrimonial home." On the same point, Asquith L.J., said (3): "Constructively, the deserter "may be the party who remains behind, if that party has "been guilty of conduct which justifies the other party in "leaving. Secondly, to afford such justification the conduct "of the party staying on need not have amounted to a "matrimonial offence, such as cruelty or adultery. But "thirdly, it must exceed in gravity such behaviour, vexatious "and trying though it may be, as every spouse bargains to

(1) [1947] P. 25.
(2) Ibid. 30.
(3) [1947] P. 45.

"endure when accepting the other 'for better, for worse.' "The ordinary wear and tear of conjugal life does not in itself "suffice. Where the learned judge seems to have erred is "in supposing that on the evidence before him conduct "complying with this last test had been established." Asquith L.J. goes on to point out: "This would appear to "be a question of law, involving, as it does, the issue whether "there was any evidence or no evidence to support the judge's "conclusion. But between the extremes indicated there "is obviously a no-man's land where the issue is one of fact. "This does not debar an appellate tribunal from disturbing "the judge's findings if in the view of that tribunal they are "plainly wrong."

These three cases were decided before the decision of *Barker* v. *Barker* (1) on December 15, 1948. *Buchler* v. *Buchler* (2) was apparently not there cited. *Barker* v. *Barker* (1) was an appeal to the Divisional Court from a decision of justices finding that a husband had been guilty of persistent cruelty and of wilful neglect to maintain. Lord Merriman P. said (3): "Included in the summons was "a charge of wilful neglect to maintain. The justices have "not dealt specifically with that in their reasons, but, "apparently, the order was based on both, on the ground "of wilful neglect to maintain and of persistent cruelty. "A question has arisen whether it is possible to separate these "two grounds, so that, even if the wife does not succeed "on the charge of persistent cruelty, she may, nevertheless, "succeed on the ground of wilful neglect to maintain . . . . "On the facts of this case"—I emphasize those words—"no "such distinction falls to be drawn, I think that the case "really stands or falls as a whole on the finding of persistent "cruelty, I propose, therefore, to deal with it on that basis." Then he discussed the evidence, found that there was no evidence of cruelty, in that there was not a shred of evidence that the wife had suffered injury or reasonable apprehension of injury, and allowed the appeal. He said nothing, except what I have read, on the alternative charge of wilful neglect to maintain.

Hodson J. said (4): "Mr. Sleeman said on the other "branch of the case, namely, wilful neglect to maintain, as "I think he was bound to say in this case, that something

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(1) [1949] P. 219.
(2) [1947] P. 25.
(3) [1949] P. 220.
(4) Ibid. 225.

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"less than cruelty would justify a wife remaining apart from "her husband. I think that that is an unsound proposition. "It will not do to say that because a grave and weighty "matter will justify one spouse in leaving the other, therefore "something less than cruelty will do. The grave and weighty "matter which justifies one spouse in leaving the other is "very often something different from cruelty and something "which might even be regarded as more calculated to disrupt "family life, such as the persistence in a false allegation of a "criminal charge, which was the subject of the decision in "*Russell* v. *Russell* (1). Many people might regard this as "something worse than cruelty involving the mere infliction "of a physical injury causing injury to health. The existence "of cruelty depends not on the magnitude but rather on the "consequence, actual or apprehended, of the offence; and, "dealing with conduct which is either cruelty or not cruelty, "it is, in my view, not open to any court to say: 'This is "'not cruelty, but it is so near it that it amounts to a grave "'and weighty matter justifying separation.' . . . . There "being, in my opinion, no other matter apart from persistent "cruelty which justifies the wife in remaining away from "her husband from June 19, so as to put her in a position "to claim separate maintenance, that ground of the order "also falls, and the husband's appeal should succeed."

It is argued for the husband that that is his case, and that the commissioner having found that the husband was not cruel, there was no justification for the wife's leaving. If Hodson J. meant to say that, once a charge of cruelty has failed to be established, it is impossible for a wife to establish grounds justifying her refusing to live with her husband, with great respect to him I think that inconsistent with the decisions to which I have referred, and that this court ought to follow *Russell* v. *Russell* (1) and *Buchler* v. *Buchler* (2). I think, however, that that is not what Hodson J. meant to say. What I think he meant to say was that either the blows inflicted by the husband on the wife amounted to cruelty in that they injured her health or were likely to injure her health, or they were not of such a nature. If they were not of such a nature then, there being no other evidence in the case at all, the court ought not to say that although they were trivial blows in effect, they justified the wife in leaving

(1) [1895] P. 315; [1897] A. C. 395.

(2) [1947] P. 25.

her husband. That point of law for the husband accordingly fails.

As regards the question of fact, that was pre-eminently a matter for the learned commissioner. [His Lordship reviewed the evidence, and continued] : I do not think that there is anything in the point that the evidence is so overwhelmingly one way that we ought to say that the commissioner was wrong in coming to the conclusion that there were ample grounds justifying the wife in leaving her husband.

His Lordship said that the third point made for the husband was that if the husband drove the wife out, then he was a constructive deserter and that the judgment was inconsistent, because the commissioner had refused to grant the wife a decree of judicial separation. It seemed to him that on the wife's case, quite apart from the alleged intercourse in 1931 which the commissioner had found not to be established, there was a sufficient reconciliation to bring to an end any constructive desertion which started when the wife left the husband. As to the alleged desertion by the husband in 1932, the commissioner said that he was not satisfied about that and he exercised the right he had of applying the discretionary bar. The claim was seventeen years old ; the case was one of unreasonable delay, and in these circumstances he ought not to grant the wife a decree of judicial separation. That was a matter of discretion for the commissioner with which the court would not interfere.

COHEN L.J. The commissioner found that the wife's story was more reliable than that of the husband. He said " I am " satisfied that she did leave her husband by reason of some " treatment of his, and I am satisfied to that extent that she " was justified in leaving him ; but events subsequently to " a great extent wipe out any matter of complaint that she " had at that time, because I am satisfied also in regard to " the subsequent period, that the wife's story is nearer the " truth than the husband's in regard to subsequent events." It seems to me that the clear meaning of that paragraph in the commissioner's judgment is that he is accepting the wife's story as being more reliable on the whole than that of the husband.

It was argued for the husband that the commissioner rejected the wife's evidence as regards the acts of cruelty. I do not think that that is correct. The commissioner said :

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"In regard to the charges of cruelty, in order to satisfy the "court on these matters she has to show that there has been "injury to life, limb or health, bodily or mental, or reasonable "apprehension of it. Well, I am not satisfied that such a case "has been proved." I do not think that he is there saying that the facts alleged are not proved, but that, whether or not the acts were proved, they did not have the effect on the health of the wife requisite to justify giving her any relief on the ground of cruelty. He must have found that some of the acts which constituted the alleged cruelty had in fact been committed by the husband; otherwise he could not have found that she was justified "to that extent," which I think means "in this respect," in leaving him. I think that he must indeed have found that in substance her evidence on that point was correct; otherwise it would have been impossible, in accordance with the decision of *Buchler* v. *Buchler* (1) to which my Lord has referred, to have said that the conduct was of such a serious nature as to justify her in leaving him.

For these reasons, in addition to those given by my Lord, I agree that the appeal fails.

ASQUITH L.J. I also agree.

Appeal dismissed.

Solicitors for the wife: *Silkin and Silkin.*
Solicitor for the husband: *J. Cory Holcombe.*

(1) [1947] P. 25.

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RICHARDSON *v.* RICHARDSON.

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July 1, 4, 5, 6.

Bucknill, Asquith and Denning L.JJ.

Divorce—Cruelty—Condonation of single act of adultery—Conduct, short of cruelty which will revive condoned adultery—Conduct calculated to inflict misery on innocent spouse and, in fact, leading to breakdown of the marriage.

Conduct, short of "cruelty"—a ground for divorce—may revive condoned adultery:

Per Bucknill L.J. And will do so, if it is such as to make decent married life of the spouses together, impossible. This question must be approached with some care, because it was unbelievable that if adultery had been condoned for a number of years, a wife was entitled to say that it was revived, because her husband had on one occasion slapped her face or had come home drunk or had done something else of that kind which might amount to " matrimonial misconduct " or " a breach of conjugal " kindness."

Per Denning L.J. Such conduct short of " cruelty " will revive condoned adultery, if it consists of harshness or neglect of a real and substantial kind which is such as to be likely to inflict misery on the innocent party and does indeed lead to a breakdown of the marriage.

Accordingly in this case, where the forgiven husband was shown to have been, on occasions, selfish and inconsiderate to his wife and made remarks to her which would be hurtful to one of her sensitive temperament, but the trial judge did not find that the breakdown of the marriage was due to the husband's conduct, the court refused to hold that the husband's conduct had revived the condoned adultery.

Observations of Lord Stowell in *D'Aguilar* v. *D'Aguilar*, cited by Sir John Nicholl in *Durant* v. *Durant* (1825) 1 Hagg. Ecc. 733, at p. 765, and of Sir John Nicholl himself in that case at p. 762, followed.

APPEAL from a decision of Mr. Blanco White, K.C., who, sitting as a Commissioner in divorce had dismissed a petition by a wife for divorce on the ground of cruelty.

The parties married in 1942, the wife being aged 21 and the husband 22 years of age, then serving in the R.A.F. In May, 1944, a child of the marriage was born. In June, 1945, the husband went to Norway on operations and, whilst there, on one occasion he committed adultery. The husband was demobilized in February, 1946, and in April of that year he confessed his adultery to his wife ; but she forgave him and continued cohabitation, the commissioner rejecting the wife's evidence that her husband more or less forced her to have intercourse with him after his confession. On December 4, 1947, the last intercourse took place between the spouses, and on December 15, 1947, when the spouses were living at the wife's parents' house, the wife's father, in effect, turned the husband out of the house. No explanation was furnished to the husband of this action. According to the wife the husband was turned out of the house, because she complained of his sexual demands.

Early in 1948 the wife brought her petition.

The charges of cruelty for the most part alleged sexual demands by the husband on the wife, excessive in number and made at improper times and places. The husband

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was also said to have been cruel to the wife in that he maltreated the child of the marriage and made cruel observations to his wife. There was no physical violence by striking alleged on the part of either spouse.

The commissioner found that there was no evidence that he regarded as satisfactory that the husband had been cruel to the wife in respect of demanding sexual intercourse in such an unreasonable way as to amount to treating her with cruelty. The commissioner found as a fact that the husband treated the child kindly and that he believed a certain amount of discipline was beneficial to the welfare of the child. The commissioner dismissed the petition and the wife appealed.

Two points were taken, amongst others, on the appeal: (1.) that the commissioner was wrong in finding that there was no cruelty on the part of the husband; and (2.) that the conduct of the husband had been such as to revive the adultery which, admittedly, the husband had committed on a single occasion in Norway and which had been condoned by the wife.

The Court of Appeal dismissed the appeal on the first ground and the case is not reported upon the facts or upon that issue. The court accepted counsel's statement that the second ground was referred to before the commissioner. Apparently, the commissioner did not mention it in his judgment, because he considered, in effect, that the real question was: Has the husband been cruel? Once he had decided that the husband had not been cruel, that, in his opinion, was the end of the second point.

I. H. Jacob for the wife (after dealing with the case upon the facts and taking other points alleging misdirection of himself on the part of the commissioner, on which this case is not reported, continued:) Acts and conduct which do not amount to "cruelty", that is, a ground for divorce, may be sufficient to revive condoned adultery. See the judgment of Sir John Nicholl in *Durant* v. *Durant* (1), where he cites a passage from the sentence of Lord Stowell in *D'Aguilar* v. *D'Aguilar* (2): "It is held that words of heat and passion, "of incivility, or reproach are not alone sufficient for an "original cause; nor harshness of behaviour; but I cannot "but think that their operation would be stronger in "condonation." Sir John Nicholl himself said in *Durant* v.

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(1) (1825) 1 Hagg. Ecc. 733.

(2) Ibid. 765.

Durant (1): "The plainer reason and the good sense of the "implied condition"—on condonation—"is that 'you shall "'not only abstain from adultery, but shall in future treat "'me—in every respect treat me (to use the words of the law) "'with "conjugal kindness." On this condition, I will "'overlook the past injuries you have done me.'" See also the judgment of Sir Francis Jeune P., in *Houghton* v. *Houghton* (2), and of Scott L.J., in *Beard* v. *Beard* (3), and of Hannen P. in *Ridgway* v. *Ridgway* (4). Here there was such conduct on the part of the husband as revived the condoned adultery: there was breach of every conjugal kindness.

N. Parkes and *W. Kee* for the husband were not called on to argue.

Bucknill L.J. It was said by Mr. Jacob that *Beard* v. *Beard* (3) decided in effect that something short of actual cruelty would revive condoned adultery. It is quite clear that *Beard* v. *Beard* (3) did decide that desertion would revive adultery, a different cause of matrimonial misconduct, and it also decided that it need not be such misconduct as would in itself be a basis for a petition, because in *Beard* v. *Beard* (3) the desertion which revived the adultery was for less than the statutory three years. It is said, therefore, by Mr. Jacob that it is not necessary to prove cruelty in a case of this kind, but something short of cruelty will do. The question is, how far short it ought to be.

A number of expressions were used in *Beard* v. *Beard* (3) on that particular point. Scott L.J, who gave the judgment, said (5): "The test to be applied has seemed to depend on "the meaning of a particular judicial phrase, 'matrimonial "'offence,' used in certain reported cases, rather than on the "basic reasons of principle which underlie the controversy. "It is said by the one side that 'matrimonial offence' means "only such a breach of matrimonial duty as will entitle and, "perhaps, require the Divorce Court to grant a decree to the "aggrieved spouse, and that no degree of matrimonial breach "of duty, short of what calls for such a decree, can constitute "a 'matrimonial offence' within the meaning of the decisions. "Their argument is based on the contention that the word "'offence' 'correctly construed' carries their meaning. The "other side reply that the word 'offence' has no statutory

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(1) 1 Hagg. Ecc. 733, 762.

(2) [1903] P. 150, 152.

(3) [1946] P. 8, 10.

(4) (1881) 29 W. R. 612.

(5) [1946] P. 8, 11.

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"force, and is merely a word used compendiously in the cases "to cover any matrimonial wrongdoing, whether any decree "could or could not be based on the particular wrongdoing "in fact established. The dispute has thus seemed to turn "on a problem of interpreting a judicial phrase. I think the "broader viewpoint is the sounder and that it would be "fallacious to limit the argument of principle by any such "verbal and restrictive interpretation of a convenient judicial "phrase." If I apply those sentences to the present case, I have to ask myself: did the conduct of the husband amount to a matrimonial wrongdoing? Then I have to ask myself: what is a matrimonial wrongdoing? It is a very broad phrase. If I look further at the cases to which Scott L.J. refers, I find several sentences which throw some light on the matter. A little later on in his judgment he said (1): "If, on the other hand, those courts "treated it as only conditional forgiveness of the guilty "party, that is to say, as being granted upon a condition "imposed by the law of the court, that the married "status so preserved might again be lost, if the forgiven "spouse again broke his or her marriage vows and became "guilty of new matrimonial misconduct, then we too ought "to treat the word" (condonation) "in s. 30 of the Act of "1857 as connoting only a conditional wiping out of the "offence condoned, which would revive on the happening "of the new misconduct." The phrases "matrimonial "misconduct" and a "breach of the marriage vows," throw some light upon the question. In earlier cases, a different phrase is used, namely, that of "conjugal kindness."

The Lord Justice quoted the words of Sir John Nicholl, Dean of Arches, in *Durant* v. *Durant* (2). Sir John said: "The plainer reason and the good sense of the implied "condition is that 'you shall not only abstain from adultery, "'but shall in future treat me—in every respect treat me (to "'use the words of the law) with "conjugal kindness".'" Finally, there is a judgment of Sir Francis Jeune P., in *Houghton* v. *Houghton* (3) where he said: "The principle "is as clear as possible. When the law speaks of condonation "and revival, it means that the offence is condoned on the "condition that there shall be in the future a proper com"pliance with the matrimonial decencies and duties, and

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(1) [1946] P. 8, 11, 14.
(2) 1 Hagg. Ecc. 733, 762.
(3) [1903] P. 150, 152, 154.

"a person who goes back to live with his or her guilty spouse "goes back on that implied condition alone. Desertion is as "serious a matrimonial offence as can be imagined, because "it probably results in breaking up the matrimonial home."

One finds, therefore, a number of expressions dealing with the kind of offence which will revive condoned adultery. I think one has to approach the matter with some care because I cannot believe that if adultery has been condoned, say for seven years, that a wife is entitled to say it is revived because the husband has on one occasion slapped her face or has come home drunk, or has done something else which may amount to "matrimonial misconduct" or "a breach of conjugal "kindness." I think that the proper test to apply is one which is indicated by the words of Sir Francis Jeune P. to which I have just referred, that the conduct of the spouse must be such as to make decent married life together impossible That is putting it as broadly as I can. I think a matrimonial offence means an offence against the vows of marriage. The vows of marriage are pretty well known. Desertion is certainly one offence, and cruelty as defined by the law is another. The conduct of the wife in *Russell* v. *Russell* (1) though it did not amount to cruelty, made married life impossible and the result was the refusal of a decree of restitution of conjugal rights.

If I apply that test in this case and ask myself whether the various complaints which Mr. Jacob has put forward as breaches of conjugal kindness are such as to make life between husband and wife impossible, or tend to make it impossible, my answer is that they are not. The marriage in fact broke up because the father turned the husband out of the house. Why he turned him out of the house was never explained to the husband. The husband was under the impression he was turned out because the wife had broken her pledge of secrecy and told her parents about her husband's conduct. According to the wife, the husband was turned out because she complained of his sexual demands. At any rate, it was not the husband who left the wife willingly; it was the father who turned him out. Therefore, I think this second point fails, and that the adultery was not revived by any conduct of the husband.

The judgment of the learned commissioner was right, and this appeal should be dismissed.

(1) [1895] P. 315; [1897] A. C. 395.

ASQUITH L.J. Mr. Jacob argued every point open to him with all the force of which it was capable, but having regard to the learned commissioner's findings of fact the difficulties in his way were insurmountable by skill or art. It is not his fault that he could not convince us. I agree that the appeal should be dismissed.

DENNING L.J. I agree. If a husband should commit adultery and the wife should take him back, then in order to revive the condoned adultery it is not necessary that the fresh conduct of the guilty husband should be such as of itself to be a sufficient ground for a judicial separation or a divorce. A good deal less is sufficient. After all, the innocent wife does a praiseworthy thing to take back the guilty husband, and should not be penalized for so doing. If the guilty husband, after being taken back, does not behave properly, and the marriage breaks down afresh by reason of his conduct, without any fault of the innocent wife, she is entitled to rely on his original guilty act as a ground for divorce. Any other view would greatly hamper attempts at reconciliation, for no innocent party would be inclined to take a guilty party back if it meant being tied for ever to an unhappy marriage.

The subsequent conduct may consist of harshness of behaviour short of cruelty, but if it breaks up the marriage that is sufficient to revive the adultery. That was made clear by Lord Stowell in the sentence in *D'Aquilar* v. *D'Aquilar* as appears from the judgment of Sir John Nicholl in *Durant* v. *Durant* (1): "It is held that words of heat and passion, "of incivility or reproach, are not alone sufficient for an "original cause; nor harshness of behaviour; but I cannot "but think that their operation would be stronger in condonation." Sir John Nicholl accepted that statement as good law in *Durant* v. *Durant* (1) and put the matter in his own words thus (2): "The plainer reason and the good sense "of the implied condition is that 'you shall not only abstain "'from adultery, but shall in future treat me—in every respect "'treat me (to use the words of the law) with" "conjugal kind-"'"ness." On this condition I will overlook the past injuries "'you have done me.'" He would be a bold man who would doubt the authority of those two great judges on this subject. Scott L.J. in *Beard* v. *Beard* (3), clearly accepted what they said as authoritative, and I do the same. In the result, therefore, harshness, or neglect of a real and substantial kind which is such as to be likely to inflict misery on the innocent party, and does indeed lead to a breakdown of the marriage, is sufficient to revive the original offence.

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(1) 1 Hagg. Ecc. 733, 765.

(2) Ibid. 762.

(3) [1946] P. 8.

Applying this test, I confess that I have felt considerable hesitation in the course of this case as to whether the husband's conduct on his own admission was not sufficient to revive the condoned adultery. He was on some occasions selfish and inconsiderate, and made remarks which were hurtful to a woman of her sensitive temperament. It is an undoubted fact that her health greatly deteriorated. If the commissioner had found that the husband's conduct was the cause of the breakdown of the marriage, the condoned adultery would, I think, have been revived. But the commissioner has not so found. There are significant incidents which may also throw light on the breakdown of the marriage such as the wife receiving repeated telephone messages from another man. The commissioner has found that the husband is a very decent and respectable man. As I read the whole judgment the burden of it is that the husband's conduct was not the cause of the breakdown of the marriage. On that view of the facts it was not sufficient to revive the condoned adultery, and I agree that the appeal should be dismissed.

Appealed dismissed.

Solicitors for the wife: *Neil Maclean & Co.*
Solicitors for the husband: *Kinch and Richardson.*

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June 30
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Asquith and
Denning L.JJ.

JOHNSON v. JOHNSON

Divorce—Variation of post-nuptial settlement—Leave given to apply three years after date of decree absolute—Position to be considered as at that time, when each spouse had remarried—Not as at the time of decree absolute.

Followed. JEFFR
v. JEFFREY (No.
[1952] P. 1

Where a husband, who has been divorced on the petition of his wife, makes no application to vary the terms of a post-nuptial settlement under s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, within two months after the date of decree absolute, but, nearly three years' later, obtains leave to make this application out of time and makes it, the court, in

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exercising its discretion, must view the situation with regard to all the facts as known at the time when the application is heard and not merely with regard to those known, as they existed, within two months of the decree absolute. The original contingencies, e.g., the possible re-marriage of either or both parties to the former marriage, may have become actualities and, if so, must be taken into account as actualities.

Appeal from a decision of Ormerod J. who had varied a post-nuptial settlement after a decree of divorce.

The parties were married on April 20, 1935. On May 14, 1943, they executed a deed of separation which (reciting that the husband had, against the wishes of the wife, ceased to live with her, and had agreed to make provision for her maintenance) provided, inter alia, that the husband would pay to the wife for her support and maintenance the sum of 1*l.* 10*s.* per week during her life.

Subsequently, the husband committed adultery, and the wife petitioned for divorce on that ground: and a decree was made absolute on February 25, 1946. Thereafter, the husband made no payments under the separation deed of May 14, 1943, and he did not apply within the two months after the date of decree absolute to vary that deed under s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925. In June, 1946, the wife was remarried to a Mr. Kelly and had a child by him. Later the husband remarried and had a child by that marriage.

In 1948 the wife brought an action in the King's Bench Division claiming arrears of maintenance under the deed of May 14, 1943, at the rate of 1*l.* 10*s.* a week from the date of the decree absolute. The master gave judgment for the wife for the arrears from that time to the date of the wife's remarriage in June, 1946, but adjourned consideration of the claim for arrears as from that date, pending an application in the Divorce Division for variation of the separation deed of May, 1943. The husband obtained leave to make this application out of time. On the application, the husband gave full details of his income in an affidavit; the wife put forward no details of her income. The registrar's order was that the provision for the wife's maintenance at 1*l.* 10*s.* a week should cease as from the date of her remarriage in June, 1946. The judge varied the settlement by inserting a dum sola clause providing that the amount was to be paid to her whilst she was unmarried. Thus, the money was not payable to her whilst she was married and had a husband to support her. The wife appealed.

W. Phillips for the wife: The order varying the settlement should have been applied for not later than two months after the final decree: see r. 44 of the Matrimonial Rules, 1947. Here, the decree was made absolute on February 25, 1946. The application to vary was made by leave nearly three years later, but the application should have been dealt with as if it had been made in due time according to the rule, that is within two months of February 25, 1946, when neither of the parties had remarried.

Secondly, the terms of the deed of separation dated May 14, 1943, were that the husband should pay to the wife 1*l.* 10*s.* a week during her life. That was the bargain and the wife is the innocent spouse who petitioned for divorce and succeeded. She has done nothing to forfeit her contractual right to this weekly payment. In *Wigney* v. *Wigney* (1) Jessel M.R. speaking of an application to vary settlements said: "It was "pressed on us that guilt ought to make no difference, but, "in my judgment, the conduct of the parties is a material "circumstance and it is the duty of the court to consider "whose fault it is that the marriage has come to an end, not "with a view of punishing the guilty party, but for the purpose "of seeing what provisions it is reasonable to make." The remarriage of a woman, without more, is no ground for reducing her maintenance: *Bellenden* (*formerly Satterthwaite*) v. *Satterthwaite* (2). In a variation of settlement after divorce the interests of the children of the dissolved marriage are a principal concern of the court, but it is contrary to usual practice that an innocent spouse should suffer a curtailment of powers conferred by the settlement: *Colclough* v. *Colclough and Fisher* (3): see also *Tomkins* v. *Tomkins* (4). No doubt, if the issue is to be considered as at the date of the application for variation of settlement (contrary to my contention) the remarriage is a factor which may be taken into account. *Perkins* v. *Perkins* (5). But I have been unable to find any case where an innocent spouse has been deprived of all the income from a settlement. See also *Jacobs* v. *Jacobs* (6). The dum sola clause applies whether the wife has married a millionaire or a crippled soldier, without means other than his pension.

(1) (1882) 7 P. D. 177, 181.
(2) [1948] 1 All E. R. 343.
(3) [1933] P. 143.
(4) [1948] P. 170.
(5) [1938] P. 210.
(6) [1943] P. 7.

In *Worsley* v. *Worsley and Wignall* (1), Lord Penzance said: "The court would have a great difficulty in saying that any "deed which is a settlement of property, made after marriage, "and on the parties to the marriage, is not a post-nuptial "settlement. It would not be justified in narrowing the "reasonable scope of the words used in the section. The "substance of the matter is, that the legislature by this "section has armed the court with authority to make special "arrangements in the case of a woman being found guilty of "adultery in reference to property settled upon her in her "character as a wife". The wife in this case was without blame and she should not be deprived of the provision made for her in 1943 for the duration of her life.

P. A. Harmsworth for the husband, was not called on to argue.

BUCKNILL L.J. I will ask Denning L.J., to give the first judgment.

DENNING L.J. It is plain that this separation deed was a post-nuptial settlement which the court has power to vary under s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925. Settlements of this kind are always subject to variation by order of the court in the event of the marriage being dissolved: see *Tomkins* v. *Tomkins* (2). Take this very separation deed of 1943. The parties probably never applied their minds as to what should happen in the case of a divorce. All they had in mind was that the 1*l.* 10*s.* 0*d.* a week should be paid during the separation. But the deed says that the maintenance is to be paid to the wife "during "her life." As a matter of literal construction, therefore, it applies even after the parties are divorced. This is where the remedial powers of the Divorce Court come into play. The divorce alters the position fundamentally, and the court is enabled to vary the deed so as to do what is just between the parties. It is for this purpose that the husband applied to the court in this case, nearly three years, it is true, from the date of the decree absolute.

Mr. Phillips argued, on behalf of the wife, that she ought to have the 1*l.* 10*s.* 0*d.* maintenance notwithstanding her remarriage and the husband's remarriage. The first point that he made was that this ought to be dealt with as if the husband had applied within two months of the decree absolute, at which time the wife had not remarried, nor had the husband re-married, and that the court ought to shut its eyes to what happened subsequently. In my opinion that argument will not bear examination. When the court gives leave for an application after the two months, it is a perfectly good application and must be considered on its merits when it comes on for hearing. The powers of the court under s. 192 are quite unrestricted by any procedural rules about time. To take a parallel, when a court assesses damages long after an accident, it has regard to the actual facts that have happened between the date of the writ and the date of the assessment. The original contingencies which have become actualities are to be taken into account as actualities. So here, whenever a court comes to deal with an application under s. 192, it deals with it on the facts as known at the time when the application is heard, and not on hypothetical contingencies, as they existed, within two months of the decree absolute.

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(1) (1869) L. R. 1 P. & M. 648. (2) [1948] P. 170.

Approaching the matter in that way, the facts here are that the husband has remarried; he has a wife and a child; and he has given full details of his income in an affidavit. The wife has remarried and has a child, but she has not put before the court any details of her income; and it is a reasonable inference that she is supported by the husband she has married. Mr. Phillips says that the wife is the innocent party, and as such she has a special claim to consideration. I agree that the innocence of a party is certainly a matter for consideration, but so are many other matters. The most material factor in this case is that the wife has remarried and has a husband to support her. As Lord Greene M.R. pointed out in *Tomkins* v. *Tomkins* (1) it is a relevant consideration that, if the settlement is allowed to stand as it is, the money will or may go into the ordinary household expenses of the new establishment. So in this case the money might well go to help the new husband in the new establishment. It was for this reason that the registrar thought that the deed, so far as it provides for 1*l*. 10*s*. 0*d*. a week, should be varied by striking out the provision altogether. The judge varied it by inserting a dum sola clause, which means that the 1*l*. 10*s*. 0*d*. is to be paid to her while she is unmarried but not to be paid to her when she has remarried and has a new husband to support her.

(1) [1948] P. 170. 178.

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It seems to me that there is ample ground for the judge exercising his discretion in the way he did, and there is no possible ground for saying that he has erred in point of principle or exercised his discretion on any wrong ground or taken into account matters which he ought not to have taken into account or omitted matters which he ought to have considered. For these reasons, I am of opinion that this court is not able to interfere, even if it were inclined to do so, and the appeal should be dismissed.

BUCKNILL L.J. I agree that the appeal should be dismissed, for the reasons given by Denning L.J. in his judgment, and I have nothing to add to them.

ASQUITH L.J. I also agree.

Appeal dismissed.

Solicitors for the wife: *Vivash Robinson & Co.*
Solicitors for the husband: *W. B. Blackwell & Co.*

C. G. M.

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PETERS *v.* PETERS.

Divorce—Practice—Costs—Security for costs—Poor Persons' Procedure—R. S. C. Or. 16, *r.* 28 (5), *r.* 28 A (2).

In considering the amount of security for costs to which a wife is entitled when both parties are "poor persons" the deposit paid by her when she applied to be admitted as a poor person should be deducted from the estimate of her disbursements. For a wife is granted security for costs for the protection of her solicitor; and when she has paid him a sum of money to be devoted to covering her costs, that sum should be deducted from the amount in respect of which she would otherwise have been entitled to ask for security.

SUMMONS adjourned into open court.

Both parties, the husband petitioner and the wife respondent, were "Poor Persons." The wife applied to the registrar for an order for security for her costs, and asked for ten guineas. This sum was made up as follows: Law Society's fee—3*l.* 3*s.*; counsel's fee (for defended case)—3*l.* 3*s.*; anticipated out of pocket expenses in respect of witnesses, etc.—4*l.* 4*s.* The registrar ordered the husband to give security for seven guineas, taking the view that the three guineas which the Law Society charged in respect of their services in a case of this kind should not be taken into account in estimating the sums for which the husband should give security.

The wife appealed from that order and contended that the registrar ought to have ordered by way of security the whole sum of ten guineas which she claimed to be the amount of her probable costs. The husband also appealed and argued that the seven guineas was too much, and that the proper way to deal with the matter was to take the estimated costs of the wife at ten guineas less the 5*l*. which she had paid to the Poor Persons Committee by way of deposit and which the Poor Persons Committee had in their turn deposited with the cashier of the Law Society towards the out of pocket expenses generally in connexion with the case.

Mr. Hassard-Short, secretary of the Poor Persons Committee for London, informed the court that the ordinary procedure was for every applicant for a Poor Person's certificate to be asked to deposit the sum of 5*l*. before the Poor Persons Committee considered the case. That was done because it had been found in the past that many applicants failed to pay the deposit after a certificate had been granted and therefore the time and effort spent on the case was thrown away. The case could not be put forward for conduct without the deposit. No step towards investigating the merits of a case was accordingly taken until the 5*l*. was deposited. The Poor Persons' Committee handed over the 5*l*. to the cashier of the Law Society and not to the Services Divorce Department of the Law Society. The sum remained with the cashier of the Law Society and ledger entries were made opposite the names of each would-be petitioner. The cashier of the Law Society did not hand out any sum at all to the Services Divorce Department until he received the written authority of the Poor Persons Committee.

Bayne-Powell for the husband.
Merrylees for the wife.

PILCHER J. This is an appeal by the wife respondent from an order made by Mr. Registrar Townley Millers on June 22, 1949, ordering the husband to pay into court the sum

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of seven guineas security for the wife's costs, and it has been adjourned into open court for argument as there was a question of principle involved.

[His Lordship referred to the facts set out above and to Or. 16, r. 28, sub-r. 5, and to r. 28A, sub-r. 2 (1) and continued :]

I am quite satisfied that where, as in this case, the wife has actually handed over in effect to the conducting solicitor a sum to be devoted to covering her costs then the proper way to deal with the matter where she subsequently makes an application for security for costs is to deduct any sum so paid by her from whatever the proper sum may be in respect of which she would otherwise have been entitled to ask for security. The proposition is well established that a wife is nowadays granted security for costs or part of her costs for the protection of the solicitor conducting her case.

In this case in fact the Law Society have in their hands a sum of 5*l.* The wife estimated her costs at ten guineas. The appropriate method of procedure would be to subtract the 5*l.* from the ten guineas and to order the husband to pay the balance, namely 5*l.* 10*s.* 0*d.*, by way of security. I have very little doubt that that is the proper way to deal with this matter.

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(1) By R. S. C. Or. 16, r. 28, sub-r. 5 (which refers to proceedings by and against a poor person): The Poor Persons Committee "may require a poor "person in a matrimonial cause "or in any other proceedings "where in the opinion of the "Committee the special circumstances so require to deposit "with them or as they shall "direct a sum of money in order "to cover the out-of-pocket "expenses of the conducting "solicitor, and if such a deposit "shall in relation to the "proceedings be found insufficient "such further sum as the "Committee may direct. Every "sum so deposited shall be "utilized by the Committee only "for the payment to the solicitor "of any out-of-pocket expenses "(not including office expenses) "properly incurred in relation "to the proceedings and any "surplus shall be repaid to the "poor person."

Rule 28A, sub-r. 2: "Where "a solicitor employed by "the Law Society as aforesaid "(i.e., 'for the purpose of "'conducting poor person "'matrimonial causes in which "'the poor person or any party "'. . . . is a member of the "'armed forces of the Crown') "is nominated by a Committee "as conducting solicitor for the "purpose of the proceedings, the "Committee shall pay to the Law "Society in respect of the proceedings the sum of three "guineas, or such lesser sum "as the Law Society may from "time to time prescribe, towards "the cost of the employment "of the conducting solicitor and "of the department of the Law "Society under his supervision."

Mr. Merrylees, however, had another point, which was this: The court has been informed by Mr. Hassard-Short that in some cases the Services Divorce Department of the Law Society asks the Poor Persons Committee to obtain from the petitioner a further deposit. This deposit would be for disbursements which would normally be recoverable on taxation; but in some cases it is required for disbursements which are not so recoverable. An instance of that type of disbursement is the charge of 1*l*. which it is usual for the process server to make and which, of course, the party would have to pay; but it is customary to allow on taxation only 10*s*. 0*d*. in respect of his services so that the extra 10*s*. 0*d*. would be irrecoverable on taxation. That is an example of the type of disbursement which would not be recoverable under the present practice and which the Poor Persons Committee would ask the petitioner to cover.

It may well be that in a case where it appeared that one of the matters in respect of which the wife was asking for security was an item of that nature it would be proper for the registrar to take into account the fact that that particular disbursement was irrecoverable. But in this case, where I have been told that the whole basis on which the registrar proceeded was that all the sums were properly recoverable on taxation, it seems to me that that complication is not one with which I need here concern myself. Proceeding upon the general principle which I have already indicated the amount of security which the wife is entitled to have is not the ten guineas nor the seven guineas but ten guineas minus 5*l*. which equals 5*l*. 10*s*. 0*d*.

A latitude must, of course, always be allowed to the registrar, and one would hesitate to interfere with his order if it were not clear from the note which he made at the time upon what basis he had proceeded; but in this case it is clear that the registrar deducted in form from the ten guineas which the wife claimed the sum of three guineas which he not unnaturally thought was all that the Poor Persons Committee had handed over to the Services Divorce Department of the Law Society. In fact what had occurred was that the wife had deposited 5*l*. towards the costs of her case with the Poor Persons Committee who in their turn had handed the sum over to the cashier of the Law Society. Accordingly the

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wife's appeal will be dismissed, the husband's appeal will be allowed and security will be ordered in the sum of 5*l.* 10*s.* 0*d.*

Solicitors: *Seton Pollock; F. N. W. Lockyer* (*both of the Services Divorce Department, The Law Society*).

J. B. G.

1949 *June* 29; *July* 13.

Pilcher J.

IN THE GOODS OF HARRY GILLIGAN (DECD.)

Probate—Revocation of will by marriage—Statutory exception thereto—Widow included among "next of kin"—Statute of Distributions, 1670 (22 & 23 Car. 2, c. 10)—Wills Act, 1837 (7 Will. 4, and 1 Vict. c. 26), s. 18.

The words "next of kin under the Statute of Distributions" in s. 18 of the Wills Act, 1837 (which provided that wills should be revoked by subsequent marriage except in certain circumstances) were intended to include a widow.

By the terms of a settlement made in 1890 in contemplation of the marriage of the deceased, Harry Gilligan, with Frances Ellen Richards, it was provided that in the event of there being no children of the marriage the deceased (who died in 1916) should have a general power of appointment in one moiety of the trust fund to be exercised by will, and that in default of the exercise of this power such moiety of the trust funds should be held "in trust for such person or persons as would have become "entitled thereto under the statutes for the distribution of the "personal estates of intestates on the death of the said Harry "Gilligan had he died possessed thereof intestate and without "having been married . . . ."

Mrs. Frances Ellen Gilligan died in 1902. In 1910 the deceased made a will which was in fact his last will. By that will he exercised the power of appointment over the first moiety of the fund in favour of his nephews and nieces, and as to 500*l.* thereof in favour of his executors, so that such sum should form part of his personal estate.

In 1912 the deceased married again. By a settlement made in contemplation of this second marriage the deceased granted to his second wife a life interest in the settled fund. There were no children of the second marriage. The deceased died in 1916: his second wife in 1946.

On a motion for a grant of letters of administration with that portion of the will of 1910 (whereby the deceased exercised his said power of appointment) annexed:

Held, (1.) That the provision that in the event of the deceased failing to exercise his power of appointment the trust fund should be distributed as if the deceased had died intestate and without having been married made it clear that in default of the exercise of the power of appointment the parties to the deed did not intend any widow of the deceased to take the share to which she would otherwise have been entitled under the Statute of Distributions. (2.) That the words "and without having been married" necessarily involved that the estate would not, "in default of "such appointment, pass to . . . . the person entitled as "his . . . . next of kin under the Statute of Distributions" provided that a widow could be properly called a "next of kin" under that statute. (3.) That the said words "next of kin" were intended to include a widow, for the intention of s. 18 of the Wills Act, 1837, was that a will exercising a power of appointment should only be wholly revoked by the subsequent marriage of the testator in those cases in which the instrument creating the power provided that in default of appointment the fund should devolve as on an intestacy, in which event the widow of the deceased would take her portion of the fund. (4.) That in so far as the deceased exercised in his will of 1910 the power of appointment conferred upon him by the settlement of 1890, that part of the will remained unrevoked notwithstanding the subsequent marriage of the testator.

In the Goods of Russell (1890) 15 P. D. 111, applied.

PROBATE MOTION.

The following recital of the facts is taken from the judgment: This matter came before the court on the motion of one surviving niece and the personal representatives of a deceased niece and two deceased nephews of the late Harry Gilligan for a grant to the surviving niece of letters of administration with the unrevoked portion of a will made by the said Harry Gilligan dated November 23, 1910, annexed.

On November 29, 1890, the late Harry Gilligan made a settlement of certain funds in contemplation of his marriage. The settlement provided for the usual life interests for Mr. Gilligan and his wife with trusts over for any children of the marriage. It further provided that in the event of there being no children of the marriage Mr. Gilligan should have a general power of appointment in one moiety of the trust fund to be exercised by will and that in default of the exercise of this power such moiety of the trust funds should be held, "Upon the trusts "hereinafter declared concerning the other equal moiety" namely, "In trust for such person or persons as would have "been entitled thereto under the statutes for the distribution "of the personal estates of intestates on the death of the said "Harry Gilligan had he died possessed thereof intestate and "without having been married."

There were no children of the marriage and on February 28, 1902, Gilligan's wife died. On November 23, 1910, Gilligan made a will, which in fact was his last will. By this will he exercised the power of appointment over the first moiety of the fund granted to him under the settlement of November 29, 1890, in favour of his nephews and nieces, and as to 500*l*. thereof in favour of his executors so that such sum should form part of his personal estate.

In 1912 Gilligan married again. He made a second settlement in contemplation of this marriage. There were no children of this second marriage and on March 11, 1916, Gilligan died.

By the second settlement above referred to he had granted to his second wife a life interest in the settled fund but he never made any will after his second marriage. His second wife died on February 1, 1946.

On her death the trust fund became divisible in accordance with the provisions of the settlement of November 19, 1890, and accordingly the question whether the said will of the deceased was altogether revoked by his subsequent marriage or whether the appointment therein made pursuant to the first settlement was, by reason of the saving provisions of s. 18 of the Wills Act, 1837, unrevoked, became an immediate question.

The successors of the appointees under Gilligan's will and the successors of the second wife contended that on the true construction of s. 18 of the Wills Act, 1837, that portion of Gilligan's will by which he exercised powers of appointment granted to him by the settlement of November 29, 1890, remained unrevoked by his second marriage and that the first moiety of the trust fund passed to them under his will. On the other hand the successors of those entitled to any part of the estate of the deceased of which he died intestate (other than the second wife) contended that the will was altogether revoked and that the first moiety accrued and was held upon the trusts declared in the said settlement concerning the second moiety.

The question was first raised shortly after the death of the deceased, and an application was made to the Principal Probate Registry on September 11, 1917, by George Gilligan (who was then one of the trustees of the first settlement) that the will should be brought into the registry in order that he and his co-trustee (or one of the said appointees) might apply for a grant of letters of administration with the will annexed. The will was in fact brought into and remained deposited in the Principal Probate Registry, pursuant to an order of the registrar made on September 11, 1917.

J. Bowyer and *R. T. Barnard* for the applicant.
L. M. Jopling and *Blackett Ord* for the next of kin.
Mark W. Cockle for Barclays Bank Ltd.

Cur. adv. vult.

July 13. PILCHER J., after referring to the facts as above, continued to read his judgment as follows: As I understand it, the meaning of s. 18 of the Wills Act, 1837, so far as I need consider its terms for the purposes of the present case, is as follows: namely, that the only exception to the rule that a will is wholly revoked by subsequent marriage is in so far as such will exercises a power of appointment and then only when the instrument conferring upon the testator the power of appointment provides that in default of the exercise of the power by him the fund which is the subject matter of the power shall devolve other than to the next of kin of the testator under the Statute of Distributions, 1670.

The power of appointment which Gilligan purported to exercise by his will was conferred upon him by the settlement of November 29, 1890. The material terms of the settlement provided in effect that in default of the exercise by Gilligan of the power of appointment granted to him the trust fund should pass to the person or persons who would on his death have been entitled to it under the statutes for the distribution of the personal estate of intestates had he died intestate, "and without having been married."

These last five words make it clear that in default of the exercise of the power of appointment granted to him the parties to the deed did not intend any widow of Gilligan to take the share to which she would otherwise have been entitled under the Statute of Distributions. To this extent therefore the provisions of the settlement expressly make it clear that in default of appointment the widow shall be excluded from the portion of the fund to which she would have been entitled on an intestacy. It would seem therefore that the words in the settlement "and without having been married" necessarily involve that the estate will not, to use the words of s. 18, "in default of such appointment pass to . . . . the "person entitled as his . . . . next of kin under the Statute of

"Distributions" provided that a widow can be properly called a "next of kin under the Statute of Distributions."

I was referred to *Garrick* v. *Lord Camden. Patton and Jones* (1). In that case the testator David Garrick by the residuary clause in his will provided that the residue of his estate was "to be divided amongst my next of kin as if I had died "intestate." It was held that the testators' widow was not one of his "next of kin" in the ordinary sense or in the sense in which the testator must be taken to have used the words. In that case Lord Eldon said (2): "It is competent to, and "required from, the court to look through the whole will; and "to see, whether from the whole an intention is manifested "to include the wife among those who are to be taken more "strictly as next of kin: a description prima facie excluding "her." Having reviewed the position of the widow under the other provisions of the will, Lord Eldon arrived at the conclusion that in all the circumstances it would be wrong to conclude that the testator had intended his widow to take any part of the residue and that as a widow is not "of kin" to a deceased husband, Mrs. Garrick was not entitled to any share of the residue.

I was informed that there was no reported decision as to the meaning to be given to the words "next of kin under the "Statute of Distributions," in s. 18 of the Wills Act. Looking at this statute, the words "next of kindred" are used several times. Section 3, sub-s. 3 provides for orders being made for the distribution of estates, after payment of all debts, etc. "amongst the wife and children, or children's children, if "any such be, or otherwise to the next of kindred to the dead "person in equal degree . . . ." Section 5, provides for the distribution of the estate to the wife and children, and by s. 6: "And in case there be no children nor any legal "representatives of them, then one moiety of the said estate "to be allotted to the wife of the intestate, the residue of the "said estate to be distributed equally to every of the next "of kindred of the intestate, who are in equal degree and those "who legally represent them." Section 7 of the Act contains a further passage in which a clear distinction is drawn between the wife and the "next of kindred" of the intestate (3).

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(1) (1807) 14 Ves. 372.

(2) Ibid. 382.

(3) The numbering of the sections cited is that given in Statutes at Large (Danby Pickering) 1763. In Statutes of the Realm, 1819, s. 3, sub-s. 3, is s. 1; ss. 5 and 6 are s. 3, and s. 7 is s. 4.

Looking therefore at the wording of the Statute of Distributions, it would not perhaps be unreasonable to assume that in using the words "next of kin under the Statute of Distributions," the framers of the Wills Act, 1837, intended that a will exercising a power of appointment should be wholly revoked by a subsequent marriage if the instrument conferring upon the testator the power of appointment provided, as did the settlement of November 28, 1890, that in default of appointment the fund should pass to those who would have been entitled to it under the statute for the distribution of the personal estate of intestates had the testator not been married or died a widower—that is to his true next of kin to the exclusion of his widow.

Whilst it is not strictly material for my purpose, it is interesting to observe that the Administration of Estates Act, 1925, which repeals the Statute of Distributions provides by s. 50, sub-s. 1, as follows :—

"References to any Statutes of Distribution in an instrument "inter vivos made or in a will coming into operation after "the commencement of this Act, shall be construed as "references to this Part of this Act ; and references in such "an instrument or will to statutory next of kin shall be construed, unless the context otherwise requires, as referring "to the persons who would take beneficially on an intestacy "under the foregoing provisions of this Part of this Act."

It would seem therefore that in documents to which this section applies, references to statutory next of kin will now be construed as including widows.

I was referred to *In the Goods of Russell* (1). In that case upon facts somewhat similar to those which I have had to consider in the present case, Butt J. granted administration with the will annexed to the widow of a testator who had before marriage exercised by will a power of appointment where the instrument creating the power provided that in default of appointment the fund should be divided amongst the testators' brothers and sisters who were in fact his true next of kin. It appears to have been assumed in this case that the words in s. 18 of the Wills Act, 1837, "next of kin under "the Statute of Distributions," included the widow, and Butt J. decided the case as he did on this basis. The point that the widow was not "next of kin" under the Statute of Distributions was not argued or apparently considered, but

(1) (1890) 15 P. D. 111.

the court without argument accepted the proposition that the words of s. 18 of the Wills Act, "next of kin under the Statute "of Distributions" are not confined to persons who are strictly "of kin" to the testator but include a widow who is entitled to her portion on an intestacy.

Although no argument was addressed to the point, I am naturally influenced by the fact that Butt J. accepted the proposition in question without query. In the circumstances I may perhaps be permitted to consider shortly the purpose and effect of s. 18 of the Wills Act. The section provides that wills shall be revoked by subsequent marriage except in so far as they exercise powers of appointment where the instrument creating the power provides that in default of appointment the fund subject to the power passes other than to the heir at law or "next of kin under the Statute of Distributions." If these last words are ambiguous, and it seems to me that they may be, it is right that consideration should be given to the whole purpose of the section and such interpretation given to the potentially ambiguous words as shall carry out the intentions of the legislature if these can be ascertained.

The event which the section contemplates is the remarriage of a person who has made a will and the circumstances in which a will so made shall be revoked by such subsequent marriage. If the instrument creating the power of appointment provides that in default of appointment the fund shall pass to named persons or, as in the present case, that a widow shall be excluded from all share in the fund, this manifests an intention by the settlor and grantor of the power that the fund shall not in default of appointment pass as on an intestacy. If on the other hand the instrument creating the power provides in terms that in default of appointment the fund shall pass as on an intestacy the settlor has not thereby manifested any intention actively to control the ultimate destination of the fund. It is the marriage of the testator which revokes his previously made will so that if after marriage he dies without making another will his widow will take her portion on an intestacy under the Statute of Distributions. In so far as the exercise by will of powers of appointment is concerned there would seem logically to be no reason why a will exercising such powers should not be revoked by marriage where in default of the exercise of the power the aftertaken wife is entitled to her widow's portion. Where, however, the settlor under the instrument creating the power has provided that in default of appointment no wife of the appointee shall take any portion of the fund it seems not unreasonable to adopt a construction of the words in the Act which will give effect to the wish of the settlor and will preserve such portion of the will as exercises the power of appointment.

I have accordingly come to the conclusion that the words in s. 18 of the Wills Act, 1837, "next of kin "under the Statute of Distributions" were intended to include a widow. I think the intention of the section was that a will exercising a power of appointment should only be wholly revoked by the subsequent marriage of the testator in those cases in which the instrument creating the power provides that in default of appointment the fund shall devolve as on an intestacy, in which event the widow of the deceased will take her portion of the fund.

This construction gives to the material words in s. 18 the meaning which has been assigned to them by Butt J. in *In the Goods of Russell* (1) to which I have referred. It is also the meaning which they necessarily have since 1925 in documents in which s. 50, sub-s. 1 of the Administration of Estates Act applies.

I accordingly order a grant of administration to the applicant with that part of the will which remains unrevoked annexed.

Solicitors: *Holmes, Son & Pott, for the applicant; Johnson, Weatherall & Sturt, for Hewett & Pim, Reading, for the next of kin; Evelyn Jones & Co., for Gowman, Easterbrook & Co., Paignton, for Barclays Bank Ltd.*

(1) 15 P. D. 111.

J. B. G.

Reasoning of Denning, L.J., at p. 56, *applied.* Lissack *v.* Lissack. [1950] 2 All E.R. 233.

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Bucknill, Asquith and Denning L.JJ.

Divorce—Cruelty—Whether insanity a defence to any and what extent—The M'Naghten rules.

On a petition for divorce on the ground of cruelty, the mere fact that the respondent was insane, at the time he committed the acts of cruelty, relied on by the petitioner, is no defence.

Per Bucknill and Asquith L.JJ., that it cannot be affirmed that no type or degree of insanity can excuse acts which, in a sane person, would amount to cruelty. But on such a petition, for such a defence to prevail, the insanity must, at all events, not fall short of such insanity as would afford a defence to a criminal charge within the *M'Naghten* rules (1843) 10 Cl. & Fin. 200. In other words, if the respondent knew of the nature and quality of his acts, i.e., knew what he was doing or that what he was doing was wrong, the fact that at the time of the acts he was suffering from a disease of the mind was immaterial, even if he would not have committed the acts complained of but for mental disease.

Decisions of Sir Charles Butt P. and of Lord Esher M.R., in *Hanbury* v. *Hanbury* [1892] P. 222 ; (1892) 8 T. L. R. 559, followed ; and of Henn Collins J. in *Astle* v. *Astle* [1939] P. 415, and *Kellock* v. *Kellock* [1939] 3 All E. R. 972, approved, to that extent.

Per Asquith L.J. : I am unable to accept the view that insanity can never be a defence on such a petition, because that view rests on an assumption which, if valid, compels one logically to say that no state of mind on the part of the person charged with cruelty can be relevant to his liability. Moreover, I cannot believe that a man whose acts are completely automatic, e.g., an epileptic in convulsions, can be guilty of " cruelty " in respect of such acts, partly because the assumption seems to be negatived by *Squire* v. *Squire* [1949] P. 51 (which decides that the intentional character of the respondent's act of cruelty is material, though its motive is not), partly because cruelty is still described as a matrimonial offence (and indeed, in respect of standard of proof, is now assimilated with a crime), and partly because s. 176 (*c*) of the Supreme Court of Judicature (Consolidation) Act, 1925, as now substituted in s. 2 of the Matrimonial Causes Act, 1937, speaks of one spouse " treating " the other with cruelty.

Per Bucknill and Asquith L.JJ. : On the facts of this case, it was unnecessary to decide whether the converse proposition held, viz., that if the respondent did not know what he was doing or that what he was doing was wrong, that was, in any and every case, a defence, though Asquith L.J. stated that he was inclined to take that view.

Per Denning L.J. : In the case of a petition on the ground of desertion, a specific intent on the part of the respondent must be proved and the insanity of the respondent would be material on that issue : *Williams* v. *Williams* [1939] P. 365. But in cases where the ground was adultery or cruelty no specific intent need be proved. On a petition on the ground of cruelty, insanity on the part of the respondent was never a defence, unless, at any rate, the petitioner knew that at the time at which the respondent committed the acts, his conduct was due to mental disease. On such a petition, the question was not one of punishing the respondent, but only of giving to the petitioner relief from a situation which had become intolerable. The fact that the respondent suffered from mental disease made this relief more (and not less) necessary. He was averse to introducing the tests of criminal into the sphere of civil law.

The facts of the case showed that, on the presumption of sanity, the petitioner was entitled to a decree on the ground of the respondent's "cruelty." Though the respondent was insane at the time of the acts complained of, in the view of Bucknill and Asquith L.JJ., the respondent at that time knew what she was doing and that what she was doing was wrong. It was not suggested that the petitioner then knew that the respondent's conduct was due to mental disease. A commissioner in divorce dismissed the petition on the ground that, although the wife knew of the acts she was doing, her knowledge was based, not on a normal, but on a diseased state of mind. He said that the proper test of responsibility was whether there was some physical derangement which might explain the cruel conduct and he held that the wife was not responsible for her conduct. The Court of Appeal, on the grounds above stated, allowed the appeal and granted a decree nisi.

APPEAL from a decision of His Honour Judge Archer, sitting as a commissioner in divorce, dismissing a petition for divorce, on the ground of cruelty.

The spouses were married on August 19, 1941, when the husband was thirty and the wife twenty-four years of age. On December 20, 1944, the wife went as a voluntary patient to Shenley Mental Hospital and continued there until February 1, 1945. On May 21, 1945, she gave birth to a child of the marriage. In November, 1946, the husband left the matrimonial home. In April, 1947, the wife summoned her husband before the magistrates alleging desertion, persistent cruelty and wilful neglect to maintain, but the hearing was adjourned for three months on the husband, who was a postman, consenting to pay her 1*l.* a week. In July, 1947, the husband filed his petition for divorce on the ground of cruelty. On October 18, 1947, the wife was certified as a person of unsound mind and a proper person to be taken charge of and detained under care and treatment and was again received into Shenley Mental Hospital, being discharged to the care of a relative on January 17, 1948. On September 18, 1948, the Official Solicitor filed an answer to the husband's petition for divorce, denying cruelty and alternatively pleading that if she had been guilty of the acts of cruelty alleged, she did not know the nature and quality of any of the said acts.

At the hearing of the petition the evidence proved cruelty on the part of the wife to the husband (had the wife been a sane person) but, as Asquith L.J. said, the evidence was overwhelming that her assaults, tirades, tantrums and insults were known by her to be wrong, since she never indulged in any of them except when alone with her husband. The commissioner (although it appeared that he did not consider the test of insanity laid down in *M'Naghten's* case (1) applied to the case) said that the proper test of responsibility was whether there was some physical derangement which might explain the cruel conduct. The wife indeed knew the nature of her acts but her knowledge was not based on a normal, but on a diseased state of mind. It was not just to impute to such a person such conduct and he held that on the evidence, as a whole, the wife was not responsible for her acts of cruelty and dismissed the petition.

The husband appealed.

Dutton Briant for the husband. The commissioner found that, on a presumption of sanity, the petitioner would have been entitled to a decree of divorce on the ground of " cruelty." He found that the wife was insane at the time she committed the acts of cruelty, but that her knowledge was based on a diseased state of mind and he held that the wife was not responsible for her conduct and on that ground dismissed the petition. The commissioner, therefore, refused to act on the test laid down in the *M'Naghten* rules (1). According to that test, it was plain that the wife knew what she was doing and knew that it was wrong, since she controlled her actions at all times except when she was alone with her husband. That being so, the defence of insanity did not avail her and the decree should have been granted. See the questions left to the jury by Sir Charles Butt P. in *Hanbury* v. *Hanbury* (2) and the judgment of Lord Esher M.R. in the Court of Appeal in that case who said that (3) : " He was prepared to lay down " as the law of England that whenever a person did an act " which was either a criminal or a culpable act, which act if " done by a person with a perfect mind would make him " civilly or criminally responsible to the law, if the disease in " the mind of the person doing the act was not so great as to " make him unable to understand the nature and consequences " of the act which he was doing, that was an act for which he " would be civilly or criminally responsible to the law." Insanity, therefore, to be a defence, must not fall short of such insanity as would afford a defence to a criminal charge within the *M'Naghten* rules (1). In *Yarrow* v. *Yarrow* (4) that test was in fact applied to the acts of the respondent, though it was doubted whether even that degree of insanity would afford an answer to a suit for divorce on the ground of adultery. In *Astle* v. *Astle* (1) and *Kellock* v. *Kellock* (2), both petitions on the ground of cruelty, Henn Collins J. applied that test.

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(1) (1843) 10 Cl. & Fin. 200.

(2) [1892] P. 222, 225.

(3) (1892) 8 T. L. R. 559, 560.

(4) [1892] P. 92.

But even though the wife did not know what she was doing or that what she was doing was wrong, the husband was entitled to a decree for his own protection, i.e., there can be no defence of insanity to a petition for divorce on the ground of cruelty unless, perhaps, at the times of the acts complained of, the petitioner was aware that the respondent's conduct was due to insanity. This was a view adumbrated by Sir Charles Butt P. in *Hanbury* v. *Hanbury* (3). Lord Esher M.R., in the Court of Appeal in that case (4) said that it was unnecessary to decide that point and he preferred to leave it open. No doubt where the ground of the petition is desertion and the petitioner has to prove a specific intent, insanity as bearing on that question may be a defence; see *Williams* v. *Williams* (5). But where the ground of the petition is cruelty, the petitioner has not to prove malignity or an intention to harm him, on the part of the respondent: *Squire* v. *Squire* (6). Tucker L.J. in that case said (7) that in his view the law on this matter could not be more clearly expressed than in the brief statement of Shearman J. in *Hadden* v. *Hadden* (8): "I do not question he had no intention of being cruel but his "intentional acts amounted to cruelty."

[ASQUITH L.J.: The case of *Squire* v. *Squire* (6) appears to decide that to constitute cruelty there must be an intentional act, though there need be no intention to harm. A respondent who is unconscious, it would appear, cannot be guilty of cruelty. Accordingly, it cannot be that insanity is never a defence and the protection of the spouse who is the victim is not the sole criterion on this issue.]

It is submitted that insanity is never a defence to a petition on the ground of cruelty, save perhaps when the conduct is recognized as being due to insanity at the time of its commission. If insanity is a defence, it is only so when it is proved that the respondent did not know what he or she was doing or did not know that it was wrong.

Stuart Horner for the wife. Insanity is a defence to a petition

(1) [1939] P. 415.
(2) [1939] 3 All E. R. 972.
(3) [1892] P. 222.
(4) 8 T. L. R. 560.
(5) [1939] P. 365.
(6) [1949] P. 51.
(7) Ibid. 58.
(8) The Times, Dec. 5, 1919.

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for divorce on the ground of cruelty; see *Hall* v. *Hall* (1) which was referred to in *Squire* v. *Squire* (2). The respondent in such a case should be excused for all conduct committed under an impulse which she was by mental disease deprived of the power to resist. The rules in *M'Naghten's* case (3) applicable in criminal law should not be applied in the sphere of civil law and in any case the rule now sought to be applied is regarded as unsatisfactory and harsh, since it takes no account of acts done by a person, acting under uncontrollable impulse, the product of physical derangement of the brain. The rule that if a person knows what he is doing and knows that it is wrong, does not deal adequately with the situation, since the existence or not of that knowledge may be affected by mental disorder. In cases where cruelty is alleged there must be conduct " aimed " by one spouse at the other, though there may be no intention to harm. See the judgment of Denning L.J. in *Westall* v. *Westall* (4). But there must be an intention to do the act of cruelty and insanity will affect that intention. Insanity may not only be the cause of the conduct but may affect the knowledge of it. The *M'Naghten* rules (3) pre-suppose that the person charged with a crime is fit to plead and can only be applied when a person is fit to plead. In this case, the wife was not fit to plead.

[ASQUITH L.J.: The pleader in his answer to the petition assumed the applicability of the *M'Naghten* rules (3).]

[Halsbury's Laws of England (2nd ed.) vol. 21, paras. 503 and 504 at pp. 292–3 and *Sodeman* v. *R.* (on onus of proof) (5) were mentioned.] Sir Charles Butt P. did not use the words of the *M'Naghten* rules (3). In *Yarrow* v. *Yarrow* (6) he spoke of the capacity " of appreciating the character of the acts " charged against her and the consequences which those acts " might entail," and again in *Hanbury* v. *Hanbury* when speaking of the acts of cruelty (7) the capacity " of under- " standing their nature and consequences." When a sane person has done an act the presumption is that he must have intended the natural consequences of his act. But once disease of the mind in the actor is proved, as it was in this case, the presumption no longer holds good and the issue emerges: was the actor able to foresee the natural consequences of his act?

(1) (1864) 3 Sw. & Tr. 347, 349.
(2) [1949] P. 51, 56.
(3) 10 Cl. & Fin. 200.
(4) (1949) 65 T. L. R. 337.
(5) [1936] 2 All E. R. 1133.
(6) [1892] P. 92, 94.
(7) [1892] P. 222, 225.

[DENNING L.J.: Hale in his Pleas of the Crown, ch. 2, at pp. 15–16, having scheduled "Those incapacities or defects "that the laws, especially the laws of England, take notice of" for the purpose of defining "what persons and actions are "exempt from the severity of the general punishment of "penal laws in respect of their incapacity of defect of will" includes under the category of "accidental"—"dementia." He continues: "Ordinarily none of these do excuse those "persons, that are under them, from civil actions to have "a pecuniary recompense for injuries done, as trespasses, "batteries, woundings, because such a recompense is not by "way of penalty, but a satisfaction for damage done to the "party: but in case of crimes and misdemeanors, when "the proceedings against them is ad poenam, the law in some "cases, and under certain temperaments takes notice of these "defects, and in respect of them relaxes or abates the severity "of their punishments." Surely, if that is right, insanity is no defence in the sphere of civil law, since what is required is "satisfaction for damage done."]

In *Ball* v. *Mannin* (1) the following direction to a jury was upheld in the House of Lords: "That the question for them "to try was, whether J.S. was a person of sound mind or not, "and that to constitute such unsoundness of mind as should "avoid a deed at law, the person executing such a deed must "be incapable of understanding and acting in the ordinary "affairs of life, that it was not necessary that he should be "without any glimmering of reason, and that as one test of "such incapacity, the jury were at liberty to consider whether "he was capable of understanding what he did, by executing "the deed in question, when its full purport was fully explained "to him."

It is submitted that insanity is an answer to a petition for divorce on the ground of cruelty. No doubt, there must be some standard of insanity, which is an answer and a defence to the petition. The test contained in the *M'Naghten* rules (2) is a standard, but it is a standard applicable in the sphere only of criminal law and indeed is unscientific and out-of-date when strictly applied in the case of crime. There is another standard applicable to civil law, namely, whether the actor is able to foresee the natural consequence of his act. The decision of the commissioner dismissing the petition since the wife was not responsible for her acts of cruelty should be upheld.

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(1) (1829) 3 Bligh N. S. 1; 1 Dow. & Cl. 330.

(2) 10 Cl. & Fin. 200.

BUCKNILL L.J. We need not trouble you to reply Mr. Briant. The appeal must be allowed; but we shall give our reasons in writing at a later date.

July 4. BUCKNILL L.J.: I understand the basis of the learned judge's decision to have been that although in his judgment the wife knew the nature of the acts which she was doing, her knowledge was not based on a normal but on a diseased state of mind, and was not, therefore, knowledge in the usual sense of the word. It therefore seems clear that the judge considered that the test of insanity laid down in *M'Naghten's* case (1) did not apply to this case. He said during the argument that in his view the judgment of Henn Collins J., in *Kellock* v. *Kellock* (2), who applied that test in a petition for cruelty, was inconsistent with the judgment of the Court of Appeal in *Squire* v. *Squire* (3). The question, therefore, which we must decide is whether the rule laid down in *M'Naghten's* case (1), or some rule similar in principle to it, applies to a case of cruelty such as this.

On behalf of the husband Mr. Briant argued that the test whether the wife was responsible for her conduct towards her husband was the same in a petition for divorce on the ground of cruelty as it would have been if the acts of cruelty had formed the basis of a criminal charge of injury to the husband, and that by the test laid down in *M'Naghten's* case (1) she would have been responsible, because all the evidence showed she knew quite well the nature of her acts, and that she knew what she was doing was wrong, because she controlled herself at all times except when she was alone with her husband. On the other hand, Mr. Horner on behalf of the Official Solicitor, as guardian ad litem for the wife, argued that the rule in *M'Naghten's* case (1) ought not to be extended to the case of a petition for divorce, because the rule was now regarded by scientific thought as unsatisfactory and harsh, in that it did not take sufficient account of acts done by a man under some uncontrollable impulse, an impulse which was probably the product of some physical disorder of the brain.

The test of insanity in divorce cases was considered by Sir Charles Butt P. and the Court of Appeal in *Hanbury* v. *Hanbury* (4). In that case the wife prayed for the dissolution of her marriage on the ground of her husband's adultery and cruelty. The husband in his answer alleged inter alia that if he had committed the acts charged he was of unsound mind at the time and incapable of understanding the nature of such acts, or their legal consequences. From the evidence it appeared that from 1881 the husband started to drink heavily, and from that time he was subject to attacks variously described as delirium tremens or recurrent mania, coming on suddenly and without notice, during which he was extremely violent and difficult to control, and which led to his confinement from time to time in various asylums or retreats. During the intervals between the attacks he behaved like an amiable and well educated man. Much scientific evidence was called on behalf of the husband to show that he suffered from some disease of the mind, possibly hereditary, which produced these violent outbursts. The President at the conclusion of the charge to the jury put certain questions to them, of which one was this :—whether, when the respondent committed any of the acts of cruelty and adultery charged against him he was capable of understanding their nature and consequences. The jury found that at the time the husband committed them he was capable of understanding their nature and consequences, and the President then granted a decree nisi to the wife. On appeal (before Lord Esher M.R., and Lindley and Kay L.JJ.) counsel on behalf of the husband argued that the disease from which the husband was said to be suffering produced a craving for drink, and that when the attacks came on the impulse to excess was uncontrollable. The Court of Appeal dismissed the appeal without calling on counsel for the wife. Lord Esher M.R. in the course of his judgment said (1) : " Assuming a diseased mind and that the " diseased mind gave him certain impulses—he would not call " it an uncontrollable impulse as he did not know what that " meant in such a case as this—the respondent knew what " he was doing, and that he was doing wrong. An act of " adultery was a culpable act against the wife. He was " prepared to lay down as the law of England that whenever " a person did an act which was either a criminal or a culpable " act, which act, if done by a person with a perfect mind would " make him civilly or criminally responsible to the law, if " the disease in the mind of the person doing the act was not " so great as to make him unable to understand the nature and

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(1) 10 Cl. & Fin. 200.

(2) [1939] 3 All E. R. 972.

(3) [1949] P. 51.

(4) [1892] P. 222; 8 T. L. R. 559.

(1) 8 T. L. R. 559.

" consequences of the act which he was doing, that was an " act for which he would be civilly or criminally responsible " to the law. Consequently, even though the respondent's " mind was diseased he was as responsible to the law as if " his mind was not diseased. The judgment of the learned " President, therefore, was right." The principle laid down by the Court of Appeal in this case was followed by Henn Collins J. in *Astle* v. *Astle* (1). In that case Henn Collins J. declined to accept the view that there is no degree of insanity that will afford an answer to a charge of cruelty in the Divorce Court, and continued (2): " If, then, there be a degree of " insanity which affords an answer to a matrimonial suit, " how is it to be safely measured except by the test applied " in all other courts ? " The learned judge cited s. 176 L. (c) of the Supreme Court of Judicature (Consolidation) Act, 1925 as substituted in s. 2 of the Matrimonial Causes Act, 1937 (3), and said (2) : " I emphasize the word ' treated ' because that " seems to me to connote a conscious action, and appears to " indicate an action of which the doer knows the nature and " quality . . . . I find that he knew he was uttering threats " against the wife. Upon that view of the facts he was " responsible in law for what he then did." In *Kellock* v. *Kellock* (4), on the same day Henn Collins J., had to deal with another case of alleged cruelty by a spouse who pleaded insanity. In the course of his judgment the judge said that the respondent wife was suffering from a disease of the mind, known as manic depressive insanity. " I have no doubt," the judge said (5) : " that the acts of the wife of which com- " plaint is made were the outcome of disease of the mind, " a disease which probably had its inception before marriage. " At the same time the medical evidence compels me to find " . . . . that the wife at all material times knew what she " was doing, and that what she was doing was wrong." On this conclusion the judge granted the husband a decree. In Halsbury's Laws of England (2nd edit.), vol 21, p. 293, s. 504, the text is as follows : " In an action at common law or in " chancery where the responsibility of a person alleged to be

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(1) [1939] P. 415.

(2) Ibid. 419.

(3) By s. 176, so amended : " A petition for divorce may be " presented . . . . on the ground " that the respondent . . . . " (c) has since the celebration of " the marriage treated the " petitioner with cruelty."

(4) [1939] 3 All E. R. 972.

(5) Ibid. 973.

" of unsound mind is in question, the issue generally directed " is 'was the person alleged to be of unsound mind at the " 'date in question capable of understanding the nature of " 'the act he was performing?' "

Dealing with the facts of the case before us it seems that the crucial issue is the mental condition of the wife during the period from the time when she had come home after the birth of her baby at the end of May, 1945, to the time when her husband left her and went to his parents in November, 1946. During this period there was no evidence of physical violence by the wife, but there was constant, unreasonable and loud nagging and accusations of infidelity which eventually injured the husband's health. If this conduct was due to some disease of the brain it is impossible to say when that disease started. It may have been present when the marriage took place; it may have been the product of some love affair while her husband was abroad on service, followed by marital intercourse, hateful to her, and the birth of her child, thereby producing conditions which so preyed upon her mind as to produce impulses which she did not and perhaps could not control, when alone with her husband. It may not have developed its full force until the time when she was certified. These are speculations to which there is no answer. If the wife deliberately behaved towards her husband in a way which was not in itself quite irrational, and under circumstances which indicated that she knew what she was doing and that her conduct was wrong, and if that treatment had the natural result of injuring his health, then all the elements seem to me to be present to show that she treated him with cruelty.

It is not necessary in this case to express an opinion on the further point argued by Mr. Briant that the husband, for his own protection, would be entitled to a decree on the ground of cruelty, although the wife did not know the nature and quality of the acts which were put forward as acts of cruelty. The point was mentioned by Sir Charles Butt P. in his charge to the jury in *Hanbury* v. *Hanbury* (1), to which I have already referred, where he put forward the view that if the husband suffered from madness of such a nature as to necessitate keeping him in duress for the rest of his life, there is no danger of violence to the wife and, therefore, in such a case, a plea of insanity might be an answer. On the other hand, if the madness is such as need not entail the permanent incarceration

(1) [1892] P. 222.

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of the husband but only his restraint from time to time, but is of such a nature as will produce violence on his part and thereby endanger the safety of the wife, then in such a case a decree in favour of the wife might properly be made. "I conceive," said Sir Charles Butt (1), "that the object of "the Divorce Act is not so much, or nearly so much, the "punishment or retribution for a marital offence as the "protection of the party who is in peril. . . . . In such "a case I can well conceive that, although in some instances "insanity may be one of those misfortunes which must be "taken by a wife with her husband for better or for worse, "and though it may assume the form of a disease, yet if it is "such as to imperil the wife's safety she is entitled to the "protection of the court. Assuming for a moment that these "attacks were not brought on the respondent by his own self-"indulgence, assuming that they were the result of hereditary "disease, I should be still disposed to hold that acts of cruelty "committed in one of these fits of mania would entitle the "wife to the remedy which she asks—separation from her "husband. If the mania is intermittent and recurrent, the "husband is entitled to go home when he recovers from time "to time—the wife cannot refuse him admission to the con-"jugal home; and if the mania is likely to recur accompanied "with violence which would place the wife in peril, the ordinary "protection which she is supposed to obtain by proceedings "in lunacy is a delusion, because it does not protect her "against the return home of her husband, who is liable at "any moment to become a lunatic." On appeal Lord Esher M.R. dealt with the question in this way; he said (2): "There "was a larger question which the President touched upon "but did not decide, namely, whether, even if the respondent's "mind had been such that he did not know the nature of what "he was doing or that he was doing wrong, the petitioner "would or would not be entitled to a divorce." Lord Esher said it was unnecessary to decide that question, and he desired to leave it open.

Henn Collins J., in *Astle* v. *Astle* (3) decided against such a view, on the ground that it would introduce a measure of legal responsibility not applied in any other court. "On the "facts of this case," he said (4): "the respondent would "not be held answerable outside this court either civilly or

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(1) [1892] P. 224.
(2) 8 T. L. R. 559, 560.
(3) [1939] P. 415.
(4) Ibid. 418.

"criminally for his assaults, and it is therefore a very strong "step to say that in this court by these self-same acts he has "done something which is in this court not only an offence, "but may, and indeed must, since divorce is not a discretionary "remedy, alter his civil status." There seems to be much to say on either side of this difficult question. Without some considerable qualifications such a doctrine would in some cases lead to obviously unjust results.

Since the decision of the Court of Appeal in *Russell* v. *Russell* (1), that a spouse under certain circumstances may defeat a petition for restitution of conjugal rights, although he fails to prove legal cruelty, the danger to one spouse owing to the intermittent insanity of the other spouse may be removed to some extent. However, it is not necessary in this case to decide this difficult question, and I do not wish to express an opinion about it. I am in favour of allowing this appeal.

ASQUITH L.J.: I agree. According to one view, no type or degree of insanity can excuse acts which in a sane person would amount to cruelty. This view assumes that the sole object of granting matrimonial relief in cases of cruelty is the protection of the victim. The victim, so the argument runs, is just as much injured or imperilled by the acts of a mad spouse as by those of one who is sane. The assumption involved receives only a qualified support from the authorities, for example Sir Charles Butt P. in *Hanbury* v. *Hanbury* (2), speaks of the protection of the victim not as the sole object but as the "main object."

But apart from this, it leads, if pressed to its logical limits, to the conclusion that not merely is insanity of whatever kind, on the part of the aggressor, immaterial, but that no state of mind, intention or knowledge on his part, can be relevant.

I have had the advantage and pleasure of reading in advance the judgment to be delivered by Denning L.J., to the effect that save when the charge is one of desertion, insanity is never a defence except, perhaps, when its existence is known to the victim at the time of the acts complained of. With great respect, I cannot go the whole way with my brother, nor, on the view I take of the facts, is it necessary to do so. The view he propounds has in my opinion never been distinctly affirmed in any decision binding on this court. In more than one

(1) [1895] P. 315; [1897] A. C. 395. (2) [1892] P. 222, 224.

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case the court has deliberately left the point open; for instance the Court of Appeal did so in *Hanbury* v. *Hanbury* (1); and the decision of this court in *Squire* v. *Squire* (2), though it decides nothing directly as to insanity, seems to me plainly to affirm that the state of mind of the aggressor is relevant to liability. That case decides that the intentional character of the aggressor's act is material, though its motive is not. Suppose the acts complained of by the petitioner consisted of blows struck by the respondent of a kind likely to cause severe pain. According to *Squire* v. *Squire* (2), as I read it, the respondent to be found guilty of cruelty must not only hit the petitioner, but hit the petitioner intentionally, and therefore must know he is hitting the petitioner. The case decides that while this much must at least be proved, it is not necessary to go further and prove that the respondent intended to cause pain and was, therefore, animated by spite; for an agent is presumed to intend the natural consequences of his acts. I, therefore, am unable to accept the view that insanity can never be a defence, partly because that view rests on an assumption which, if valid, compels one logically to say that no state of mind on the part of the person charged with cruelty can be relevant to his liability. Moreover, I cannot believe that a man whose acts are completely automatic, e.g. an epileptic in convulsions, can be guilty of "cruelty" in respect of such acts; partly because the assumption seems to me to be negatived by *Squire* v. *Squire* (2); partly because cruelty is still described as a matrimonial offence (and indeed in respect of standard of proof is now assimilated with a crime); and partly because the Matrimonial Causes Act, 1937, speaks of one spouse "treating" the other with cruelty, an unmeaning or inappropriate expression in the case of wholly unconscious or unintended action. In any event, if I am wrong and protection of the victim is the sole criterion, such protection seems to be necessary whether or not the aggressor was known at the time to the victim to be insane.

On the other hand it is plain that the presence of insanity of some sort or other, without more, will not necessarily afford a defence. What type or degree, therefore, of insanity will avail a spouse charged with cruelty? The inference I draw from the authorities is that, so to avail, the insanity must, at all events, not fall short of such insanity as would afford a defence to a criminal charge within the *M'Naghten*

(1) 8 T. L. R. 559. (2) [1949] P. 51.

rules (1). In other words, if the actor knows the "nature and "quality of his acts," that is to say knows what he is doing, and knows he is doing wrong, the fact that he is suffering from a disease of the mind is immaterial even if he would not have committed the acts complained of but for such disease.

It is unnecessary in the present case, having regard to the view I take of the facts, to decide whether the converse holds, namely, that if the respondent does not know what he is doing, or does not know it is wrong, this is in any or every case a defence, though for myself I incline to that view. Certain authorities, one at least of which is binding upon us, seem to me to assume the applicability of the *M'Naghten* rules (1), and I do not see any logic in applying them unreciprocally or by halves. These authorities are or include the following: *Astle* v. *Astle* (2) (as qualified by *Squire* v. *Squire* (3)) and *Kellock* v. *Kellock* (4), where Henn Collins J., explicitly adopts the *M'Naghten* criterion (1), both in its affirmative and negative applications. These decisions are entitled to great respect, but are not binding on this court. On the other hand, the decision of the Court of Appeal in *Hanbury* v. *Hanbury* (5), is binding on us. In that case Sir Charles Butt P., in the court of first instance had expressed the opinion that the criterion was whether the insane aggressor understood the "character and consequences" of the acts complained of. In the Court of Appeal, Lord Esher M.R., with whom the other two Lords Justices concurred, used the following language (6): "The jury found that the respondent knew what "he was doing when he committed the acts, and understood "their nature and consequences. . . . The jury were "perfectly entitled to come to the conclusion they did, and "he thought that it was the only sensible conclusion at which "they could have arrived. . . . There remained a question "of law. Assuming a diseased mind, and that the diseased "mind gave him certain impulses—he would not call it "an uncontrollable impulse, as he did not know what that "meant in such a case as this—the respondent knew what he "was doing, and that he was doing wrong. An act of adultery "was a culpable act against the wife. He was prepared to "lay down as the law of England that whenever a person "did an act which was either a criminal or a culpable act,

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(1) 10 Cl. & Fin. 200.
(2) [1939] P. 415.
(3) [1949] P. 51.
(4) [1939] 3 All E. R. 972.
(5) 8 T. L. R. 559.
(6) Ibid. 560.

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" which act, if done by a person with a perfect mind, would " make him civilly or criminally responsible to the law, if " the disease in the mind of the person doing the act was not " so great as to make him unable to understand the nature and " consequences of the act which he was doing, that was an " act for which he would be civilly or criminally responsible " to the law. Consequently, even though the respondent's " mind was diseased, he was as responsible to the law as if " his mind was not diseased." In this passage the Master of the Rolls uses three formulæ : (1.) knew what he is doing when he did the acts, and understood their nature and consequences ; (2.) knew what he was doing, and that he was doing wrong ; (3.) able to understand the nature and consequences of the act he was doing.

It is patent that he treats all of these formulæ so far as knowledge of what one is doing goes, as interchangeable. It is further clear that he had in mind, throughout, the *M'Naghten* rules as the criterion. Under these rules a person charged with a crime cannot repel the presumption of sanity and his consequent responsibility for his acts, unless he can show that he did not know the " nature and quality of his " acts," or, knowing this, did not know he was doing wrong. Juries are apt, unless this formula is paraphrased or explained, to suppose that the " nature " of an act and its " quality " are different things (a fallacy, as was held by the Court of Criminal Appeal in *Rex* v. *Codere* (1) : they are synonyms). The time-honoured phrase employed to obviate this error is that the accused must show either that he did not know what he was doing, or did not know he was doing wrong. When, in his second formula, Lord Esher says the respondent knew what he was doing and that he was doing wrong, I feel not a shadow of doubt that he had this popular paraphrase in mind. As indicated above, I feel as little doubt that his first and third formulæ are regarded by him as meaning the same thing as his second. The fact that in the first and third, reference is made to knowledge not only of the nature of the act but of its consequences, is not inconsistent with this conclusion. The more obvious consequences of an act are incorporated in the act itself. An act in the narrowest sense of the word means, as Holmes J., has pointed out, merely a muscular contraction, e.g., a contraction of my forefinger. But if my forefinger is on the trigger of a gun, and I know the gun is pointed at X,

(1) (1916) 12 Cr. App. R. 21, 26–7.

the obvious consequence of the muscular contraction is that X will be killed or injured; the act is then the act of shooting X. In speaking of the consequences as well as the nature of the act, I do not think the Master of the Rolls (or the other judges who have used the same formula) meant more than that in asking whether the agent "knew what he was doing" you must take into account, in addition to the muscular contraction, those of its consequences which must have been plain to the actor.

If this is right, that is to say, if the respondent cannot escape liability for cruelty provided it appears that she did know what she was doing, and knew that she was doing wrong, I am clearly of opinion that she has failed to make out any defence. The evidence is all one way. To take the second point first, the evidence is overwhelming that her assaults, tirades, tantrums and insults were known by her to be wrong; for she never indulged in any of them except when alone with her husband. As to the first point, Dr. Dick's evidence is that of a man who saw her repeatedly over the material period, and he is emphatic that she knew what she was doing. Not only did she behave unexceptionably before strangers, but she performed successfully a practical wage-earning job as receptionist to an osteopath, and looked after the child efficiently. The county court judge rejects this evidence for reasons which, making every allowance for his opportunities of observing the witness's demeanor, seem to me inadequate. Foremost, ostensibly, among these reasons is his acceptance of Dr. FitzGerald's evidence. One may concur with the learned county court judge's opinion that this evidence was very fairly given, without concurring in his conclusion that it displaced what Dr. Dick had said. Dr. FitzGerald had the respondent under observation during two periods, at Shenley Mental Hospital, from December, 1944, to February 1, 1945, and from October, 1947, to January, 1948. As to the intermediate period of nearly three years he had no direct contact with or observation of her, and his view of her condition during that period could not be more than an inference from her condition before and after it. His views, whether direct or inferential, should have been invited mainly, if not exclusively, on the question whether she knew, during this interregnum, what she was doing and whether it was wrong. But in the main the wrong questions were, in my view, put to Dr. FitzGerald. He was asked whether in his opinion the respondent was "responsible" or "certifiable," questions based on the learned judge's view that the *M'Naghten* criterion was irrelevant, and that some other wider, but quite undefined, criterion of insanity was applicable. He does not seem to have appreciated either that the Court of Appeal had in effect asserted the *M'Naghten* criterion or that a person may suffer from insanity of the will (as opposed to the intellect), and may indeed be certifiable without being insane within the *M'Naghten* rules. This robs the bulk of Dr. FitzGerald's very fair and candid evidence, for reasons for which he is not in any degree responsible, of much value in the present case. He himself at one point protested at being asked whether the respondent was " responsible," and no wonder. No one tells him whether " responsible " is intended to mean morally or legally responsible and, if the latter, in what precisely legal responsibility consists. In those circumstances it is impossible to treat his evidence as invalidating that of Dr. Dick, especially in view of replies such as the following : (Q.) " In pursuance " of that she apparently did those acts, but when she did them " she would know, would she not, the sort of thing she was " doing ? " (A.) " She might have, Sir." (Q.) " You have " seen no evidence from anybody, have you, to support the " view that she did not know what she was doing at the time " when she was not in your care ? " (A.) " No, I quite agree " I have no evidence. We all want to be fair to these two " people. It is very difficult, I agree, but that is my answer. " I have no evidence that during that period she did not know " what she was doing."

I agree that the appeal should be allowed.

DENNING L.J.: If Mrs. White had committed a criminal offence at any time after December 19, 1944, and had set up the defence of insanity, I should have thought it almost certain that the jury would have found her guilty but insane at the time. They would have rightly given great weight to the fact that she had been twice in a mental hospital and that, in the view of the very experienced medical superintendent of that hospital, she was suffering from schizophrenia and was throughout not a responsible person and was certifiable as a lunatic. His testimony would have impressed the jury just as it did the commissioner here. The views of the general practitioner would not have prevailed against it. I assume, of course, that the jury would be properly directed according to the *M'Naghten* rules, but, even so, I feel sure they would find her to have been insane at the time of doing the act. Their verdict would be given under a statute, the words of which seem almost exactly to express the commissioner's finding in this case, namely, that she was "insane "so as not to be responsible according to law, for her actions, "at the time when the act was done." In my opinion, therefore, the commissioner's finding to that effect should not be upset. It is because I have come to this conclusion that I do not feel able to dispose of this case on the simple ground that she was not insane within the *M'Naghten* rules. The case, therefore, does raise to my mind the important question whether, in proceedings for divorce on the ground of cruelty, insanity is a defence or not.

In my opinion, both on principle and authority, the effect of insanity is to be regarded differently in the civil courts from what it is in the criminal courts. This is because the presence of mental disease is often hard to recognize. The light of reason may fade gradually and imperceptibly. Friends and neighbours may speculate on this or that cause, but never appreciate which is the right one until the darkness becomes obvious. Then looking back, each one of them can say, as surely as any mental specialist, that, all through the time of fading light, there was an insidious disease worming its way into the mind of the unfortunate sufferer. Each will then readily forgive conduct which before he had felt to be unforgivable. But does this mean that all that has happened in the half-light is to be wiped out as if it had never been ? During this time innocent third persons may have been injured by the sufferer. He may have made contracts and broken them, or he may have committed civil wrongs, and all done at a time when he was unknown to be a lunatic, although he has since been found to be so. If he is a man of wealth or is insured, are not the injured persons to be compensated from his estate ? If the matter were free from authority I would say they clearly are, because it is not a question of punishing him, but only of compensating them.

So also it seems to me that, in divorce cases, if such a man has treated his wife with cruelty, she will be entitled to maintenance, judicial separation or a divorce, because there again it is not a question of punishing him but only of giving her relief from a situation which has been rendered intolerable by his conduct. The presence of mental disease makes this relief more, and not less, necessary. Affection may be destroyed, and the home broken, long before the disease is recognized. That is what happened both in this case and in the recent case of *Cooper* v. *Cooper* (1949 and unreported) where a husband, unknown at the time to be insane, attempted to strangle his wife and afterwards killed their baby. These cases are quite unlike criminal cases where the only question is punishment. I can well understand that a man should not be punished for acts which are outside his control by reason of mental disease : but I do not see why his wife should not be given relief from her unfortunate plight.

I venture to think that the authorities support these views. In the case of ordinary contracts, it is settled law that a person of unsound mind is liable on his contract unless the other party, at the time of the making of the contract, was aware of his incapacity : see *Molton* v. *Camroux* (1), and *Imperial Loan Co.* v. *Stone* (2). In the case of torts such as trespass and assault, it is also settled that a person of unsound mind is responsible for wrongful conduct committed by him before he was known by the injured person to be of unsound mind, even though it has since become apparent that such conduct was influenced by mental disease which was unrecognized at the time : and this is so, even if the mental disease was such that he did not know what he was doing or that what he was doing was wrong : because the civil courts are concerned, not to punish him, but to give redress to the person he has injured. This was laid down long ago, not only by the full court in *Weaver* v. *Ward* (3), but also by such great authorities as Lord Bacon, Bacon's Works, Vol. 7 (Spedding's edit., 1857), at p. 348, and Sir Matthew Hale (1 Hale P.C. 15). It has ever since been accepted as the law not only in this country (see *Mordaunt* v. *Mordaunt* (4), per Kelly C.B.), but also in the United States (*Williams* v. *Hays* (5)) ; in Canada (*Taggard* v. *Innes* (6)) ; and in New Zealand (*Donaghy* v. *Brennan* (7)), where all the English authorities are collected.

I am aware that these rules of law have been criticized by some jurists who would make responsibility in contract depend on real consent, and liability in tort depend on blameworthiness, but I venture to think that this criticism is somewhat out of date. Recent legislative and judicial developments show that the criterion of liability in tort is not so much culpability, but on whom should the risk fall. Notable examples occur in the liability of a master for or to his servant, and in the escape of dangerous things. I can understand, of course, that where a specific intent is a necessary ingredient of the wrong, a man may not be responsible, if he was suffering at the time from a disease which made him incapable of forming that intent, e.g. *Director of Public Prosecutions* v. *Beard* (1). But the cases which I have cited show that assault and trespass, to which I would add negligence, do not fall within that exception.

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(1) (1848–9) 2 Exch. 487; 4 Exch. 17.

(2) [1892] 1 Q. B. 599.

(3) (1616) Hobart, 134.

(4) (1870) L. R. 2 P. & M. 103, 142.

(5) (1892) 42 Am. St. R. 743.

(6) (1862) 12 Upp. Can. 77.

(7) 19 N. Z. L. R. 219.

Turning now to divorce cases it will be seen that the same principles have been applied. In the case of desertion where a specific intent is a necessary ingredient of the offence, insanity is a defence, if it is of such a degree as to make the man incapable of forming that intent, *Williams* v. *Williams* (2). But in the cases of adultery and cruelty no specific intent is necessary, and although insanity has often been raised as a defence there is no case in which it has been made good. It failed in *Yarrow* v. *Yarrow* (3) ; *Hanbury* v. *Hanbury* (4) ; *Astle* v. *Astle* (5) ; and *Kellock* v. *Kellock* (6). Take cruelty in particular, for it is what we have to deal with in this case. A specific intent to injure is not an essential ingredient in cruelty any more than it is in assault and battery, *Squire* v. *Squire* (7). It is sufficient if there is conduct which is aimed at the other, *Westall* v. *Westall* (8). If malignity had been an essential element, as Henn Collins J. thought in *Astle* v. *Astle* (5), it may be, as he thought, that insanity would be a defence. But this court in *Squire* v. *Squire* (7) held that malignity was not essential. It followed the view of Lord Stowell in *Kirkman* v. *Kirkman* (9), where he said that in cruelty cases if safety "is endangered by violent and disorderly affections of the "mind, it is the same in its effects as if it proceeded from mere "malignity alone." Now Lord Stowell was the greatest judge in these matters that this country has ever produced, and on the strength of his authority I say that a violent and

(1) [1920] A. C. 479.
(2) [1939] P. 365.
(3) [1892] P. 92.
(4) [1892] P. 222 ; 8 T. L. R. 559.
(5) [1939] P. 415.
(6) [1939] 3 All E. R. 972.
(7) [1949] P. 51.
(8) 65 T. L. R. 337.
(9) (1807) 1 Hagg. Cons. 409, 410.

disorderly affection of the mind, that is insanity, is of itself no answer to a petition for divorce on the ground of cruelty.

I have not dealt with the difficult question what would be the position if, at the time of the violence, the injured party knew that the other was of unsound mind. I can well understand that a point might be reached when the conduct was so irrational that it was obvious to the injured party that the conduct was not cruelty but was due to mental disease. Subject to that qualification, which does not arise in this case, I am of opinion that insanity is not a defence to a charge of cruelty. I appreciate that Asquith L.J., is inclined to think that insanity is a defence if it is of such a degree as to satisfy the *M'Naghten* rules. But that is an unscientific test which is not applied even in criminal cases by the Home Office doctors who often have the final word on the matter. I am myself averse to introducing the tests of the criminal law into the civil code, and divorce, after all, is a civil matter. *Mordaunt* v. *Moncrieffe* (1), and *Tilley* v. *Tilley* (2).

If insanity is to be, of itself, a defence to a charge of cruelty I should have thought that the respondent should be excused for all conduct committed under an impulse which he was, by mental disease, in substance deprived of any power to resist, just as Lord Atkin's committee thought he should be excused for his crimes on that ground. That indeed was Mr. Horner's argument, and it is only because I think that insanity is not of itself a defence that I think his argument should be rejected. It is, in my opinion, not a defence unless at any rate, the petitioner knew that the conduct was due to mental disease. That was clearly not the case here, and for this reason, I think the appeal should be allowed.

Appeal allowed.
Decree nisi granted.

Solicitor for the husband: *William P. Webb for Willett and Phillips, Bexhill-on-Sea.*

Solicitor for the wife: *The Official Solicitor.*

(1) (1874) L. R. 2 Sc. & D. 374. (2) [1949] P. 240, 258.

C. G. M.

LUFF *v.* LUFF

1949
Oct. 26.
Barnard J.

Divorce—Practice—Security for costs—Money deposited by wife with her solicitors—Effect on amount of security.

A sum deposited by a wife with her solicitors for the prosecution of her suit must be taken into account when assessing the amount which a husband should be directed to find as security for her costs. Where, therefore, a husband had been ordered by the registrar to find security to the extent of 75*l.*, and the wife had previously deposited 35*l.* with her solicitors, it was held on appeal to the judge that the registrar should have taken the sum deposited by the wife into consideration in fixing the amount of security, which was accordingly reduced to 40*l.*

Williams v. *Williams* [1929] P. 114, applied.

SUMMONS ADJOURNED into open court.

By an order of the registrar a husband was directed to find security for his wife's costs to the extent of 75*l.* The wife had already deposited 35*l.* with her solicitors, and she had borrowed the money to make the payment. The husband appealed on summons to the judge in chambers and the summons was adjourned into open court as stated.

Reference was made in argument to *Peters* v. *Peters* (1) in addition to the cases cited in the judgment.

Merrylees for the appellant.
Stranger-Jones for the respondent.

BARNARD J. said: This is an appeal by a husband from an order made by the registrar directing him to find security to the extent of 75*l.* The matter first came before Hodson J who directed that the summons should be adjourned into open court.

Counsel for the husband puts his case in this way: It was clear that the wife had deposited 35*l.* with her solicitors for the prosecution of this suit; the registrar estimated the costs up to setting down and for the hearing at 75*l*, and directed the husband to find security to that extent. He accordingly argues that the registrar should have taken into account the 35*l.* which was actually in the hands of the wife's solicitors.

Counsel for the wife on the other hand submits that this 35*l.* should be considered merely as part of the wife's separate assets, and that the registrar was entitled on that footing to direct the husband to find security to the full extent. He has also referred me to the well-known case of *Allen* v. *Allen* (1), but I do not think that that decision really helps me at all. The husband in that case was ordered to find security for costs and apparently he appealed as far as the Court of Appeal. Although the wife had a separate income of her own of 280*l.* a year, the court had nevertheless ordered the husband to pay her 500*l.* a year alimony pending suit. In my opinion, that makes it clear that the court ordered the husband to pay alimony pending suit because it considered that the wife's own income was not sufficient for her to live on in the station in life to which she was accustomed. The Court of Appeal, very naturally, said that if they were to interfere with that order for security and therefore force the wife to pay some of the costs of the hearing, they would really be flouting the whole order that the court had already made, namely, that the 280*l.* p.a. plus the 500*l.* p.a. were what she needed if she were to live in her ordinary station in life.

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(1) Ante, p. 28.

If I had not the statement before me in this case that the 35*l.* had been actually paid by the wife to her solicitors towards the expenses of this suit, and if I had merely been told that she had 35*l.* or 50*l.* or whatever it might be, I should be very loth to interfere with what the registrar had done because he would be quite entitled to take that figure into account and, none the less, to say that the husband ought to find the security to the full extent.

But I do not think that the registrar in this case has really acted in accordance with the well-known principles to be applied in these matters. The position is made clear by Hill J. in *Williams* v. *Williams* (2): "The main object of "security in recent years at any rate is that justice may be "done by the wife being enabled to procure the assistance of "solicitor and counsel and come to court."

So far as the 35*l.* goes, the solicitor is in pocket to that extent towards presenting her case. Therefore I think that, as the registrar has estimated that the total costs would be 75*l.*, the proper order to make in the circumstances is to direct the husband to find security for the balance of 40*l.*

I therefore set aside the order made by the registrar and direct the husband to find security to the extent of 40*l.*

Solicitors: *Rhys Roberts & Co.*; *Martin Blake, Harrow.*

(1) [1894] P. 134.

(2) [1929] P. 114, 118.

J. B. G.

PREST *v.* PREST.

1949
Oct. 23, 24.

Lord Merriman P. and Ormerod J.

Justices—Maintenance—Discharge of maintenance order—" Resumption " of cohabitation "—Intervening dissolution of marriage—Summary Jurisdiction (Married Women) Act, 1895 (58 *&* 59 *Vict. c.* 39), *s.* 7 *—Summary Jurisdiction (Separation and Maintenance) Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 51), *s.* 2, *sub-s.* 2.

There can be no resumption of cohabitation within the meaning of s. 2, sub-s. 2, of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, between a man and woman whose former marriage has been dissolved. A maintenance order, therefore, is not automatically discharged when the parties live together again after decree absolute as if they were husband and wife; and the continuation, variation or discharge of such orders remains a discretionary matter to be considered on the merits.

Bragg v. *Bragg* [1925] P. 20, considered and applied.

DIVORCED husband's appeal to the Divisional Court.

The parties were married in 1935. On September 18, 1946, the wife obtained an order for maintenance of 1*l.* a week for herself and 10*s.* 0*d.* a week for each of two children—2*l.* in all. In the spring of 1947 she obtained a divorce on the ground of her husband's adultery with a named woman. In November, 1947, the parties started to live together again as husband and wife, and on November 26, 1947, the " wife " wrote to the clerk to the justices regarding certain proceedings which were pending: " With reference to the letter my former " husband has received ordering him to appear in court on " the 30th December, I wish to notify you that I would like " to drop the case against him. He came to me a week ago " in a terrible condition. He was so ill that I took him in " my home and looked after him. He is still here, and is " quite unable at the moment to maintain me. He will not " be fit for work for a week or two yet, but when he is we have " decided to remarry and make a fresh start. I want you " to notify the magistrates of my decision and to excuse " my husband's non-appearance."

The parties continued to live together until March, 1948, when the man left and married the woman named in the divorce petition. He paid his former wife, however, a total of 30*s.* 0*d.* a week from April 2, 1948, to May 21, 1949, except on one occasion in May, 1948, when he deducted 6*s.* 0*d.* " for " income tax." That deduction evoked a strong protest by the " wife " who wrote: " If I receive less than 30*s.* 0*d.* this

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"week-end I will place the matter in the hands of my "solicitor . . . ." In January, 1949, she became ill and found it difficult to make ends meet; she wrote to her former husband asking him to lend her some money to see her through, adding "I cannot pay out of 30*s.* 0*d.* a week." She did not go to the court for a variation of the order.

On May 28, 1949, the man reduced his weekly payments to 15*s.* 0*d.*, and he shortly afterwards applied to the justices for a discharge of the order of September, 1946, on the ground that there had been "a resumption of cohabitation" within the meaning of the statutes. The justices dismissed his application on August 24, 1949, and gave as their reasons: "We are of opinion that the resumption of cohabitation "contemplated by s. 7 of the Summary Jurisdiction (Married "Women) Act, 1895, and s. 2, sub-s. 2, of the Summary "Jurisdiction (Separation and Maintenance) Act, 1925 (1), "means a resumption of cohabitation as man and wife by a "husband and wife—a resumption of the consortium. The "parties were not husband and wife when they lived together "from November, 1947, to March, 1948. A suggestion was "made that the resumption of cohabitation might in any "case be a mere pretence on the part of Mr. Prest, seeing "that he married Mrs. P. so soon after leaving Mrs. Prest. "In view of the decision we had already arrived at, we did "not consider that matter."

The husband appealed.

Roger Ormrod for the appellant. Under *Bragg* v. *Bragg* (2) maintenance orders continue after decree absolute and until further order—the decree itself does not automatically determine a maintenance order by altering the status of the parties. But by s. 7 of the Summary Jurisdiction (Married Women) Act, 1895 (as amended by the Act of 1925) a "married

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(1) Summary Jurisdiction (Married Women) Act, 1895, s. 7: ". . . . If any married "woman upon whose application "an order shall have been made "under this act . . . . shall "voluntarily resume cohabitation "with her husband . . . . such "order shall upon proof thereof "be discharged."

Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 2, sub-s. 2: "Where "a married woman with respect "to whom an order has been "made under the principal Act "resumes cohabitation with her "husband after living apart from "him . . . . the order shall cease "to have effect on the resumption "of such cohabitation . . . ."

(2) [1925] P. 20.

"woman" or her "husband" are the only persons who can apply to the justices for a variation. Such applications after dissolution are now common, and unless, therefore, *Bragg* v. *Bragg* (1) was wrongly decided, the words "married "woman" and "husband" must include a divorced woman and her former husband.

That being so, if a divorced woman and her former husband set up a joint home and live together as if once more man and wife, there must be a "resumption of cohabitation" within the meaning of the section, for "married woman" and "husband" cannot have different meanings in two parts of the same section of the Act.

The respondent did not appear.

LORD MERRIMAN P. This is a "husband's" appeal against a decision of the Blackburn borough justices, given on August 24, 1949, whereby they dismissed his application to discharge an earlier order made on September 18, 1946, in circumstances which are, so far as I know, unprecedented. It is a very curious and by no means an easy case. I ought to say that there is no serious dispute, so far as I can see, on the facts, which have been laid very fully before us by Mr. Ormrod on behalf of the husband, and I do not think that even if the wife had been represented any further light could have been thrown upon the matter.

The husband's application was based before the justices, and has been based here, on the allegation that the wife, in whose favour the order of September 18, 1946, was made, had resumed cohabitation with her husband within the meaning of s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, as amended by s. 2, sub-s. 2, of the Summary Jurisdiction (Separation and Maintenance) Act, 1925. (His Lordship read, and contrasted, the relevant parts of those sections, and said that there was a clear indication in the Act of 1925 of the date, or alternative dates, as from which the order was automatically to be vacated, and continued:)

At the time when these two parties began to reside again together under the same roof and to have sexual intercourse with each other, as admittedly occurred between November, 1947, and the end of March, 1948, their status was that the marriage had been dissolved by a decree absolute pronounced on April 21, 1947. It is nevertheless argued that this decision to live together in November, 1947, a decision avowedly

(1) [1925] P. 20.

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taken with a view to a possible remarriage, can properly be described as the case of a "married woman with respect "to whom an order has been made resuming cohabitation "with her husband after living apart from him." The same argument, admittedly, would have been addressed to us had the intended marriage preceded the so-called resumption of cohabitation. That is manifestly an argument which requires careful consideration, but it is said that this conclusion follows inevitably from the decision of this court in *Bragg* v. *Bragg* (1). The argument is this: It was decided in *Bragg* v. *Bragg* (1) that although a woman has ceased to be a married woman by reason of the dissolution of her marriage, and although she can no longer describe as her husband a defendant who was her husband at the time of the making of an order, yet she may continue to hold that order notwithstanding the dissolution of the marriage; it must therefore inevitably follow that the same two parties continue the relationship of husband and wife for all purposes of the Summary Jurisdiction (Separation and Maintenance) Acts, wherever the words "husband" and "wife" occur, although the marriage status has been dissolved. That contention is a startling one, which requires careful examination.

[His Lordship proceeded to review the facts, and after referring to the letter which the "wife" wrote to the justices on November 26, 1947, said:] That letter plainly suggests that although both parties and the court had, up to that moment, been content to treat this order as a live order notwithstanding the divorce six months before, the wife then regarded the order and all proceedings under it as at an end. Point is added to that view of the matter by what happened when they parted in March, 1948. Here again, it is clear that there was a discussion between them about the wife's maintenance in future. There was no hint or suggestion that either the wife or the husband regarded the order as still being in force, but a fresh agreement was made for the sum of 30*s.* 0*d.* a week, and that sum was punctually paid week by week. [His Lordship observed that when the "wife" complained in May, 1948, about a deduction for income tax, she was considering payments which the "husband" had undertaken to make on the break-down of their renewed association rather than the maintenance ordered by the justices; and he referred also to the fact that when the "wife" was ill in January, 1949, she wrote to her "husband" asking him for more money instead of going back to the court.

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(1) [1925] P. 20.

His Lordship continued:] These matters bring me to a consideration of *Bragg* v. *Bragg* (1), a case which has been followed consistently in this court, though I am not aware that it has ever been considered by a higher court. It is, perhaps, not unimportant to bear in mind that *Bragg* v. *Bragg* (1) was decided on s. 7 of the Act of 1895 before it was amended by the Act of 1925, for it is a decision which was given in 1924. It was a decision, therefore, given upon a section which contained, inter alia, the words "If any married "woman . . . . shall voluntarily resume cohabitation with "her husband . . . . such order shall upon proof thereof "be discharged." Without the necessary application to the court and proof of the fact before the court, that Act by itself did not discharge the order.

The stipendiary magistrate in *Bragg* v. *Bragg* (1) referred to that section in a considered judgment, which is set out in the Law Reports (2) and decided that the mere fact that the marriage had been dissolved did not automatically vacate or discharge a maintenance order obtained by a wife. I will read only one sentence, towards the end of his judgment: "I am of opinion that the court has a discretion in these cases, "and should not exercise it against a woman who has "subsequently obtained a divorce, unless some good cause "is shown for such exercise." Dealing with that argument, Lord Merrivale P. says (3): "There are grounds of common-"sense why an order which dealt with maintenance and not "with the general obligations of married life should continue "to subsist. That, however, does not conclude the matter "at all. It is still necessary to see what are the limits of the "justice's jurisdiction. Mr. Frampton"—who was appearing for the husband—"made a true remark, which went to the "root of his own case. He said that the decree absolute "had put an end ipso facto to the magisterial order, and "that the appellant had only gone to the magistrate to call "his attention to the fact and to get him to make an order "discharging the previous order. Well, if the previous "order had ipso facto been discharged, the magistrate, of "course, had no jurisdiction to do anything. If it had not "been discharged, then the discharge of it depends upon

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(1) [1925] P. 20.

(2) Ibid. 21.

(3) [1925] P. 20, 24.

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"s. 7 of the Act of 1895. As my brother"—that was Horridge J.—"pointed out, the appellant is put into rather "a dilemma by the two arguments addressed to us: If the "order is discharged ipso facto there is no jurisdiction of "the magistrate to entertain this summons; if the order "is not so discharged, there is a discretionary jurisdiction."

The effect, therefore, of *Bragg* v. *Bragg* (1) is that it is a matter of discretion whether or not, in the circumstances of any given case, the justices should discharge, as against a wife whose marriage has subsequently been dissolved, an order made while she was truly the wife of the husband. But this court has frequently emphasized that it is not a discretion to be exercised arbitrarily or capriciously, but judicially. This court has said this in at least three reported cases, namely, *Mezger* v. *Mezger* (2), *Kirk* v. *Kirk* (3), and *Wood* v. *Wood* (4). I will deal with each case quite briefly. In *Mezger* v. *Mezger* (2) where the magistrate had refused to discharge an order because the marriage had been dissolved in a foreign country on grounds not recognized by English law, and also because the wife's financial position required the continuance of the maintenance, it was held that neither of those grounds could possibly amount to a judicial exercise of the discretion. The same thing was held by this court in *Kirk* v. *Kirk* (3), where there had been a Scottish divorce, the husband being a domiciled Scotsman, though the maintenance order had been made in England at a time during the marriage when an English court of summary jurisdiction had had jurisdiction over the case; it was held in that case by the Divisional Court, which reversed the finding of the justices, that the proper exercise of the jurisdiction was to leave the wife to such remedy by way of maintenance as she had in the Scots Courts. In *Wood* v. *Wood* (4) this court again reversed a decision of magistrates who had refused to vary an order when they had in effect come to their decision solely on the ground that the wife needed the money. They had, indeed, completely ignored the essential fact that it was the case of a wife who had been divorced on the ground of her own adultery.

In each of these cases this court exercised its own discretion on the ground that it did not consider that the justices had exercised a judicial discretion in such a way that the exercise of their discretion ought not to be interfered with.

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(1) [1925] P. 20.

(2) [1937] P. 19.

(3) [1947] W. N. 161; 63 T. L. R. 422.

(4) [1949] W. N. 59.

In this case the only point with which the justices have dealt is the point regarding " resumption of cohabitation."

[His Lordship read the justices reasons, and continued :] It is argued that that decision is wrong in law. I think that it is right. Because some positive act on the part of the court is required to vacate an order on the ground of dissolution of marriage between spouses in respect of whom an order was made (more particularly when one bears in mind, as I have already said, that *Bragg* v. *Bragg* (1) was decided under s. 7 of the Act of 1895, before it was amended), and because the original wife and the original husband are treated as being husband and wife for the purpose of the exercise of the court's discretion to continue or to discharge an existing order, it does not seem to me to follow in the one instance in which a later statute provides the conditions upon which an existing order is automatically vacated, that for the purposes of the section laying down these conditions parties who are no longer husband and wife in law are to be taken to come within the words " a married woman in respect of whom an order has " been made under the principal Act resumes cohabitation " with her husband after living apart from him." There does not seem to me to be any necessary logical connexion between the two things, and I decline to hold that this order was automatically vacated when the wife and the husband started living together again with a view to re-marriage. It seems to me to be making nonsense of the whole thing.

On the other hand, in my opinion, there is a ground upon which these justices ought to have discharged this order in the exercise of their discretion. I do not blame them for not exercising it in this way, for they appear only to have been asked to deal with this construction of s. 2, sub-s. 2, of the Act of 1925, which I hold to be inadmissible.

However, we have the whole facts before us, as they had them. In my opinion there was no warrant for keeping this order alive from the moment when the wife wrote to the clerk of the justices in November, 1947. She meant by that letter that the order was finished, and she made that still clearer by the arrangements made when this temporary association between a former husband and a former wife came to an end a few months later. I cannot think that a belated attempt on the eve of these proceedings to reinvoke the existence of the order ought to weigh in the balance at all. It seems to me to be a clear case, on the facts, for the exercise of the justices' discretion in one way only, and that is to discharge this order, which had been regarded as a dead letter ever since November, 1947, by both spouses.

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(1) [1925] P. 20.

This court not merely has the right but it has the duty to exercise its own discretion, and in so doing we are unfettered by any exercise of the justices's discretion, for there is no indication in the statement of the justices reasons that they have even considered this point. That being so, this appeal should be allowed, but for the reasons which I have stated, and not for the reasons on which this appeal is based.

ORMEROD J. I agree. The argument which has been put forward by Mr. Ormrod, on behalf of the appellant, appears to me to be as follows: s. 7 is the section which provides for an order being varied or discharged, as the case may be, and s. 7 also provides that "if any married woman upon "whose application an order shall be made under this Act "or the Acts mentioned in the schedule hereto shall voluntarily "resume cohabitation with her husband . . . . such order "shall upon proof thereof be discharged." Because these matters are in the same section, it is submitted, they should be construed in the same way, and because a man and woman who have been husband and wife, but whose marriage has been dissolved by a decree absolute, live together again, they must therefore be resuming cohabitation within the meaning of these sections. The same principle must apply in construing s. 2, sub-s. 2, of the Act of 1925.

For my part I can see no justification for that argument. These two people are merely coming together and living together in the same way as any other two unmarried people who may choose to live together at any time. If there were children of that living together, those children would, of course, be illegitimate; and I find it quite impossible to say that that is a "resumption of cohabitation" by a wife with her husband.

Under those circumstances I think that the reasons given by the justices for their decision are clearly right, but at the same time I agree with my Lord, for the reasons which he has so fully and carefully set out in his judgment, that this

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is a case where the justices should have exercised their discretion. I therefore agree that this appeal should be allowed and the order set aside.

Justices order set aside.

Solicitors: *Vizard, Oldham, Crowder and Cash, for Henry Backhouse & Son, Blackburn.*

J. B. G.

Reversed. C.A. [1950] 2 All E.R. 297. | *Reversed.* [1951] P. 124

WAY v. WAY; ROWLEY v. ROWLEY; KENWARD v. KENWARD; WHITEHEAD v. WHITEHEAD.

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Divorce—Nullity—Marriage—Ceremony in Russia—Validity of ceremony—Wife respondents forbidden to join petitioners in England—Consent—Law applicable in considering questions of consent.

The marriages of four men domiciled in England to citizens of the U.S.S.R. were celebrated while the men were serving in that country during, and immediately following the war of 1939 to 1945. They returned to England, but the Soviet Government refused to allow their wives to follow them or to allow them to join their wives in the U.S.S.R.; and the men eventually petitioned for decrees of nullity, submitting that the marriages were void (*a*) for want of form; and (*b*) for want of consent. Their petitions were heard together.

Held, (1.) that although certain provisions of the Russian code had not been complied with by the registrars, the marriages were not thereby avoided, for by Russian law the registration of a marriage is indisputable evidence of the existence of that marriage, and the marriages had in fact been duly registered. That registration was conclusive between the parties as to matters of form; (2.) that when considering whether or no there has been a true consent to a marriage that question should be dealt with by reference to the personal law of the parties rather than to the law of the place where the contract was made. Dicta in *Apt* v. *Apt* [1947] P. 127, 146; [1948] P. 83, 88 (C. A.), applied; (3.) that as the law of England was therefore applicable to the question of consent, the provision of the Russian code as to the conclusiveness of registration did not prevent consideration of this matter; (4.) that although the action of the Soviet Government in preventing the respondents from joining their husbands might shock the conscience, it did not follow that the government's failure to act in accordance with international usage avoided the marriages on the ground of mistake; (5.) that there was no reason to avoid the marriages on the ground of mistake because the rights and duties imposed on persons domiciled in the U.S.S.R. varied from those imposed in this country, although certain of them were in fact unknown to the petitioners at the date of the marriages, including an express provision that by Russian law there is no obligation on spouses to live together because the matrimonial obligations were governed by the law of the husband's domicile, i.e., English law, and not by the law of the place of celebration; (6.) that the petitions for nullity on these grounds could not, therefore, succeed.

Undefended petitions for nullity of marriage.

The following statement of facts and summary of the pleadings is taken from the judgment. In each of these four cases the petitioner was seeking a decree of nullity of marriage where a form of marriage had been entered into in the Union of Soviet Socialist Republics. Three of the marriages took place in Russia proper in 1945 and the fourth took place in Georgia in 1942, but the differences of date and place were not material. By their pleadings the petitioners claimed that marriage as understood in the U.S.S.R. did not comply with the essentials of marriage according to English law and that the ceremonies did not in English law constitute valid marriages. In the alternative they claimed that these marriages were void for want of consent. In the further alternative, they claimed that the marriages had been frustrated. The first plea was not persisted in and no argument was addressed to the court on the doctrine of frustration. The petitioners relied on absence of consent and in addition sought to maintain that the marriages were invalid for want of form. This last ground, although not pleaded, was taken into consideration in the judgment as it was the ground which was mainly relied upon by the petitioners.

In addition to the claim for nullity already outlined, the petitioner Rowley prayed for a decree of divorce on the ground of adultery, but was unable by the date of the hearing to produce evidence thereof to put before the court. The petitioner Way alleged wilful refusal to consummate the marriage and prayed for a decree of nullity on this ground also.

The material facts in the four cases were as follows: Brigadier Way, who was serving in 1941 with the British Military Mission in the Caucasus, was taken by his duties to Tiflis, where he met the respondent, a ballerina and a Russian subject, in December of that year. He was 42 and she was 27 years of age. The petitioner spoke Russian flunetly and the parties eventually agreed to marry, although the actual marriage was postponed for some time at the suggestion of the respondent. On September 11, 1942, both parties attended at the local bureau, which corresponds to what is known in England as a register office, where they produced their passports, from which the necessary particulars were taken, and where they signed the register. A certificate, which was on the file of the court, was handed to the petitioner. No entries were made on the petitioner's passport and no questions were asked about the health of the parties or their previous marriages, if any, nor was their attention drawn to any portion of the marriage code.

After the registration, the respondent continued to follow her occupation as a ballerina, and went immediately to the Opera House for a rehearsal. The parties slept together that night in the room normally occupied by the respondent. The petitioner got into her bed and manifested his desire to have sexual relations with her. This she refused without giving any reasonable excuse, merely saying that it was very hot and that she must get some rest. There was no subsequent change in the respondent's demeanor. She continued with her work at the Opera House, and on the following night she again refused intercourse notwithstanding the petitioner's urgent representations that he was going away the next day so that consummation would be rendered impossible until after the war. After a time on this night, as on the first night, the petitioner left the respondent's bed. The parties never met after September 13, 1942, when the petitioner left Tiflis on duty.

Mr. Rowley, who was on duty in Moscow with the British Army in April, 1945, met his wife, a Russian girl, in April, 1945. Each spoke a little of the language of the other, and the parties agreed to marry after an acquaintance which had lasted for several months. They attended at a register office, where they both signed the register on November 25, 1945. No entries were made in the respondent's passport. No questions as to health or previous marriages were put nor were references made to the civil code. After the marriage the parties lived together until January 17, 1946, when the petitioner left Moscow. He subsequently obtained a notarial copy of the marriage certificate.

Mr. Whitehead met the respondent, a Russian girl, in May, 1944, when serving with the British Military Mission in Moscow. She spoke fluent English and he spoke virtually no Russian. Mr. Whitehead was then married to another

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woman, but in February, 1945, he obtained a divorce and on May 19, 1945, he and the present respondent attended before the registrar. The procedure was similar to that in the preceding two cases. The register was signed, no entries were made in the petitioner's passport and no questions put as to health or previous marriage, nor was reference made to the civil code. The parties never lived together because the petitioner was posted away from Moscow immediately after the registration.

Mr. Kenward was serving with the Royal Navy in Archangel in 1945 and met the respondent, a Russian, in September of that year. Each spoke very little of the other's language. The parties attended the register office on September 16, 1945, where assistance in interpretation was given by a friend who spoke English. The petitioner was asked if this was his first marriage. He did not remember signing the register, but there can be little doubt that both parties did so, and a duplicate certificate, which had been obtained by the petitioner, was on the file. No entry was made in the petitioner's passport and nothing was said about health or the civil code. Two days later the petitioner was recalled to his ship and he had never seen his wife since.

Expert evidence of the relevant provisions of the Russian Code of Marriage, Guardianship and Family Relations was given by Mr. Wolf.

V. R. Idelson K.C. and *J. E. S. Simon* for the petitioners (the respondents were neither present nor represented, and leave to dispense with service had been given in three cases) : It is submitted that these marriages are a nullity in Soviet law ; but if the contrary be held, they should be regarded as a nullity in England owing to the absence of true consent. In the U.S.S.R. the State must give its consent to a marriage, and it is the registration of a marriage which gives it legal effect. In certain circumstances a registrar has power to refuse to act ; it is his duty to satisfy himself on certain essential matters, and to carry out certain essential duties, and if he fails to do so the registration, and therefore the marriage, is void.

In the present cases there was a failure to demand from the parties documents certifying their identities or statements from them that they were mutually aware of each other's state of health, with particular reference to venereal and mental diseases and tuberculosis. No warning was given as to the penal responsibility of the parties in the event of false statements; no entry of marriage was made in their passports. These were vitally important matters which the law demanded in order to reduce the risk of infection and transmission of certain diseases and, (by the entry in the passport), the possibility of bigamous marriages, which would otherwise be difficult to prevent in a country the size of the U.S.S.R. These requirements are matters of public policy, with which a registrar has no power to dispense; and if he should do so the marriages are void, and would be so declared by a Russian court if the facts were brought before it.

[HODSON J.: There is no evidence that the registration itself is wrong, and by s. 2 of the Marriage Law of 1926 "Registration of a marriage is indisputable evidence of the "existence of a marriage."]

Yes, but (*a*) in Soviet law a party to a transaction entered into under a misapprehension which is of substantial importance may by way of court procedure ask that the transaction should be recognized as invalid (s. 32 of the Civil Code of the R.S.F.S.R.); (*b*) the notion of misapprehension in Soviet law is very wide (judgment of the Supreme Arbitration Commission, January 15, 1924); and (*c*) even third parties and government departments may dispute the validity of registration of a marriage (decision of the People's Commissariat of Justice, December 27, 1927).

Although there appears to be no direct authority on the point, it is submitted that in dealing with cases where a want of true consent is alleged, the law applicable is the law of the petitioner's domicile, and not that of the lex loci celebrationis. (He referred to observations in *Apt* v. *Apt* (1) which, he submitted, supported this argument.) By English law there is no true consent if the party does not know what he is doing and if his ignorance concerns something which goes to the root of the matter. There was no true consent in the marriages now being considered, for the petitioners were unaware that the U.S.S.R. would forbid their wives to join them or forbid them to see their wives again. They were also unaware that by an express provision in Russian law a wife is at liberty to leave her husband directly after the ceremony, that that law provides no remedy of nullity or divorce in such circumstances, and that they were therefore marrying in accordance with

(1) [1947] P. 127, 146–7; [1948] P. 83, 88–9 (C. A.).

a law whereby their marriages would remain binding even though in effect they became a nullity. (He referred to Dicey's Conflict of Laws 6th ed., on Want of Consent of Parties, at p. 264.)

(Argument was then directed to the issue whether the respondent Way had wilfully refused to consummate the marriage.)

Cur. adv. vult.

Nov. 9. HODSON J. read his reserved judgment. He referred to the pleadings in the terms already quoted and said: The plea that marriage as understood in the U.S.S.R. did not comply with the essentials of marriage according to the English law was not persisted in, no doubt because of the decision of the Court of Appeal in *Nachimson* v. *Nachimson* (1), which disposes of this contention and which is not outdated by any material changes in the Russian law of marriage. No argument was addressed to me on the doctrine of frustration, which has never been applied to the status of marriage as opposed to a contract to marry. The distinction between the contract and the status created by the contract is clearly drawn in the judgment in *Niboyet* v. *Niboyet* (2): "Marriage is the fulfilment of a contract satisfied by the solemnization of the "marriage, but marriage directly it exists creates by law "a relation between the parties and what is called a status "of each." To such a status the doctrine of frustration has no application.

[His Lordship then referred to the facts as set out above and continued:] I propose to deal first with the question of form. This has to be determined in accordance with the law of the place where the marriage was celebrated, namely the U.S.S.R. According to Mr. Wolf, who gave expert evidence, the conception of marriage according to Russian law is that it is brought about by the consent of the parties and at one time might or might not be registered, the registration not being of the essence of the marriage but an incident useful to prove the fact. That is to say, the fact of marriage existed independently of registration just as much as birth and death. This was the position under the Marriage Law of 1926. In 1944 the position was altered by an amending law which established registration of marriage in state and social interests and also with the purpose of protecting the persons and

(1) [1930] P. 217. (2) (1878) 4 P. D. 1, 11.

property rights and interests of the spouses and children. This code was brought into force by order of the Presidium of the Supreme Council of R.S.F.S.R. of April 16, 1945, and it provides that only a registered marriage creates rights and duties in the spouses. Since all these marriages were registered it is not necessary to consider provisions governing the legality of pre-existing unregistered marriages.

The requirements for registration are dealt with by s. 4 of the law of 1926. They are as follows:

(*a*) Mutual consent to register the marriage.

(*b*) The reaching of marriageable age.

(*c*) The production of documents indicated in s. 132 of the Code.

No question arises under (*a*) or (*b*), but it is said that (*c*) was not complied with. Section 132 reads as follows: "Those registering a marriage are obliged to produce at the "time of the Declaration documents certifying their identity, "and subscribe that no obstacles indicated in Chapter 2, "Division 1 of the present Code exist, and also that they are "mutually aware of the state of their health and particularly "with regard to venereal and mental diseases and tuberculosis, "and must also indicate into what consecutive marriage, "registered or unregistered, each of them enters and how "many children he had." In my opinion, no question arises as to documents of identity, but it is true that according to the evidence of all the petitioners, there was no subscription by them of any document relating to obstacles to the marriage, the health of the spouses nor as to the existence of children, nor were there any of these questions raised.

By s. 133 of the Code of 1926 it was provided as follows: "The responsible official registering the marriage is obliged "to read to those contracting marriages, ss. 4, 5 and 6 of the "present Code, and to warn them about their penal responsi-"bility in case of false statements. After this the inscription "made in the register is read, signed by them and counter-"signed by the official."

By s. 133 (1) of the Code, added by the order of the Presidium of the Supreme Council of R.S.F.S.R., on April 16, 1945, it was further provided as follows: "In the passports of the "spouses an inscription about the registered marriage is "made indicating the surname, Christian name, patronymic "and of the year of birth of the spouse, and of the place and "time of the registration of the marriage."

These provisions were not complied with in the case of any of the petitioners. In these circumstances it is submitted that the marriages are void for want of formality.

The main difficulty in the way of this argument is that by s. 2 of the Law of 1926, as Mr. Wolf proved, registration of marriage when acts of civil status are concerned is indisputable evidence of the existence of the marriage. Some reliance was placed on the reported opinion of the Commissar of Justice to the effect that the avoidance of both registered and unregistered marriages can be applied for in Courts of Law by all government organs, public organizations and third parties interested in such cases when the decision of the main problem depends on the question whether matrimonial relations exist.

This opinion, assuming its authoritativeness, does not to my mind assist the parties to the marriage or either of them to dispute the existence of a registered marriage, since such dispute is forbidden to them by the terms of s. 2 of the law of 1926. I hold that this section is conclusive against the argument directed against the validity of the act of registration, and it is irrevelant that the registrars omitted to perform some of the duties imposed on them by the Code as a preliminary to the registration itself. The essential feature existed that prior to the registration there was, subject to the argument with which I will deal hereafter, " mutual consent to marry." The registration, even if no more than a ministerial act, is conclusive as between the parties, at any rate as to matters of form.

The second ground argued, namely, that the marriage is void for want of consent, is I think open to the petitioners on the footing that questions of consent are to be dealt with by reference to the personal law of the parties rather than by reference to the law of the place where the contract was made. This view is not covered by direct authority, but it is, I think, supported by the judgment of Lord Merriman P. in *Apt* v. *Apt* (1): " The case might be put as follows: The wife was a " domiciled British subject when she gave the power of " attorney; this is not expressed to be irrevocable; although " her intention at the time she gave it was to contract a " Christian marriage and to acquire the husband's domicile " when the marriage was celebrated, she changed her mind " and revoked the power of attorney before the celebration,

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(1) [1947] P. 127, 146.

" while she was still a British subject; and the marriage ceremony, therefore, did not effect a 'voluntary union' but only a union which is deemed to be voluntary by the law of a country to which she was not subject at the time of the revocation of the power of attorney; and that being so, the effect of the revocation should be decided according to English law."

When giving the judgment of the Court of Appeal dismissing the petitioner's appeal in this case, Cohen L.J. said (1): "In our opinion the method of giving consent as distinct from the fact of consent is essentially a matter of lex loci celebrationis and does not raise a question of capacity." Marriage is essentially a voluntary union, and as Dr. Idelson put it (and I cannot improve on the phrase), "consent is an emanation of personality." It is therefore, I think, justifiable and consistent with authority to apply the matrimonial law of each of the parties.

In the case of these petitioners, all of whom were domiciled in England, the law of England, therefore, applies to the question whether or not they consented to their marriages, and the section of the Russian Code as to the conclusiveness of registration does not shut the door against argument directed to want of consent. It is clear that if there is a mistake as to the identity of the person with whom the contract is made or an erroneous belief as to the ceremony, for example, a belief that the ceremony was one of betrothal and not of marriage, the marriage is void for want of consent.

No such mistake can be put forward here, but it is said that in these four cases the marriages were entered into in the mistaken belief: (*a*) that the administrative Soviet practice of granting permission to wives of foreigners to leave the Soviet Union with their husbands would continue as it had done before the marriages took place; (*b*) that they would be permitted to go and see their wives after they had parted from them; (*c*) that the marriages entered into imposed a duty on the spouses to live together, whereas in each case, in fact, by s. 9 of the Code no such duty was imposed on them.

Section 9 of the Code reads as follows: "Both spouses have complete freedom in the choice of occupation and professions. The order of keeping the common household is fixed by mutual agreement between the spouses. A change of place

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(1) [1948] P. 83, 88.

" of residence of one of the spouses does not impose on the " other a duty to follow the one."

There is no authority for introducing into the law of England mistakes of this kind invalidating marriage. As to (*a*) and (*b*), it is true that the petitioners hoped that what might be described as the normal relationship of man and wife would be recognized and observed. It is also true that it shocks the conscience that human relations should be ignored by a government which has, in fact, prevented these wives from joining their husbands, It does not, however, follow that the failure of the Soviet Government to act in accordance with international usage will avoid the marriages on the ground of mistake, and I am, in my opinion, bound to hold that it does not. As to (*c*), the rights and duties of spouses to one another will vary according to the law of the domicile of the married pair, and there is no ground for avoiding the marriage on the ground of mistake because the rights and duties imposed on persons domiciled in Russia, who marry, vary from those imposed by other countries. As I indicated earlier in this judgment, no attempt has been made to argue that a Russian marriage ought not to be recognized in this country as not fulfilling the requisites of what has been called a Christian marriage—that is to say, " the voluntary union " for life of one man with one woman to the exclusion of all " others," which is the definition given by Lord Penzance in *Hyde* v. *Hyde and Woodmansee* (1), and is the accepted definition of a marriage which is recognized by the law of this country. In my judgment, therefore, the prayer for nullity on the ground that the marriages were in each case void fails.

In the case of Way, however, on the facts stated, accepting as I do his evidence, the respondent has wilfully refused to consummate the marriage and the marriage is accordingly voidable by English law, which is the law of the matrimonial domicile. The petitioner is accordingly entitled to a decree.

In the case of Rowley there is an alternative prayer for divorce on the ground of adultery and, on his application, the petition will be adjourned.

In the case of Kenward and Whitehead I have been asked to adjourn one petition instead of dismissing both so that in the event of a successful appeal in one case, it will not be necessary to take steps to appeal in the other. I, accordingly, dismiss the petition in Kenward's case and adjourn Whitehead's

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(1) (1866) L. R. 1 P. & M. 130, 133.

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Way v. Way.

Rowley v. Rowley.

Kenward v. Kenward.

Whitehead v. Whitehead.

petition with liberty to restore. But this petition will also be dismissed (1.) in the event of no appeal being lodged in Kenward's case within the time as limited or extended by the Court of Appeal; or (2.) if an appeal is presented, in the event of the appeal being dismissed.

Solicitors: *Boyce, Evans and Sheppard.*

J. B. G.

THE RIVA LIGURE AND THE ANTONIA C.

1949
Nov. 2, 8.

Lord Merriman P.

Shipping—Prize—Occupation by British forces of enemy territory and port—Italian harbour—Massawa—Ships removed by enemy when occupation imminent and scuttled—Wrecks visible above the surface—Whether capable of seizure in prize—Condemnation.

In 1941, the Italian Naval authority, in view of the imminent capture by British forces of their territory and the harbour of Massawa, removed from the port certain ships which had been requisitioned from Italian nationals, including the *Riva Ligure* and the *Antonia C.* The ships were towed out and scuttled at varying distances from the harbour proper but the wrecks were left partly visible and identifiable and were later seized by the British Naval authority. The *Riva Ligure* was sunk close inshore and in shallow water; the *Antonia C.* was taken out a mile and a half and sunk in deeper water.

Held, that the position of the *Riva Ligure* was such that, on any reasonable interpretation, she was within the limits of the harbour, and that, when the harbour was captured, she should also be taken to have been captured and was properly condemnable in prize.

Held also, that the *Antonia C.* was taken out and scuttled at a greater distance because the British were about to capture the port. It could, however, fairly be said that she was sunk within the limits of the port and that she retained her character of a "ship" distinct from a piece of wreckage although lying in deeper water and was, therefore, condemnable in prize.

Applications by the Crown for the condemnation in prize of a number of Italian ships including the *Riva Ligure* and the *Antonia C.*

In April, 1941, the harbour of Massawa and the surrounding territory were captured by British Forces, and on February 4, 1947, a number of Italian ships, some partly submerged, were

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seized by the British Naval authority. It was proved on affidavits that the ships had belonged to Italian nationals and had been requisitioned by the Royal Italian Navy; that they had been towed out of the harbour, on the orders of the Italian authorities, and scuttled at varying distances from the shore when the Italians knew that the territory and port would be captured. The ships were left lying partly submerged with some parts visible above the surface in various parts of the bay and coast. The *Riva Ligure* and the *Antonia C.* were the only two vessels of which the respective positions called for special consideration in condemning them in prize.

Further material facts are stated in the judgment.

Quintin Hogg for the Crown: It was a question of fact whether the Crown was in effective possession of the wreck by capturing the land. Where the facts were, that in the territorial waters immediately surrounding a harbour, ships were visible above the surface, or, alternatively, below the surface in a position where they could easily be raised, then the possession of the land must necessarily involve possession of the ship.

The mere fact that the ships were outside an artificial breakwater or a natural land-locked lagoon would not of itself alter the principle to be applied. The respective positions of the *Riva Ligure* and the *Antonia C.* came within the application of that principle and the vessels are properly condemnable.

LORD MERRIMAN P. (after pronouncing decrees condemning the Italian ships *Guiseppe Mazzini, Nazario Sauro, Urania* and the *Prometeo*, which are not material to this report) said: The *Riva Ligure* was lying in a bay which could not by any possibility be described as a land-locked bay—it has a very wide open mouth—just immediately to the south of Massawa Harbour proper, but part of which, so to speak, shades off into Massawa Harbour. The *Riva Ligure* was lying in this bay at a spot which is not identified otherwise than by the fact that she was only partly submerged and, therefore, looking at the sound readings on the chart, she must have been very close inshore. I think she is covered by other cases with which I have had to deal in connexion with Massawa Harbour as being, on any reasonable interpretation, within the limits of the harbour and, therefore, I think there is no doubt that when Massawa Harbour was captured and, of course, the surrounding territory, this ship should also be taken to have been captured.

In the case of the *Antonia C.*, that vessel is in a category by itself and really does come within the cautionary reservation which I made in deciding the *Bellaman* and the *Agostino Bertani* (1) where, according to the report, I said : " I am not " called upon to consider any question concerning the limits " of the port, for both vessels were clearly within the narrowest " possible limits which could be drawn." On referring again to the chart of that harbour, it is plain that they were both right inside the artificial breakwater. I went on : " Nor need " I consider whether vessels lying in deep water, or hulks " sunk to block the harbour entrance, can fairly be reckoned " as vessels captured with the port. Such questions can be " dealt with when they arise."

I think that that question really does arise in connexion with this vessel, the *Antonia C.* It arises in a lesser degree in the case of the one I have just dealt with, the *Riva Ligure.* But the *Antonia C.*, according to the evidence of a local pilot who actually conveyed the orders for the operation from the Italian officer-in-command and himself witnessed the operation, was taken out a mile and a half or thereabouts into deep water in Harkiko Bay, to the southward of a little island called Sheikh Said Island, on which the southernmost of the two lights of Massawa Harbour is situated, and there scuttled.

Two points arise : first, whether the place itself can be said to be within the limits of the harbour and, secondly, whether the vessel is still a vessel which can fairly be said to be the subject of prize.

I will deal with the last point first. This is not like the case of the *Alberto Treves* which I dealt with about the time when other cases came on in connexion with Massawa Harbour. She was a vessel which had been blown up by an internal explosion in 1938 and had been left in peacetime at the bottom of the sea, not thought worth salving, and I adjourned that case for some evidence that there was anything which could be called a ship at all.

In this case I think it is clear that the *Antonia C.* was scuttled as a ship, and scuttled because the port was about to be captured by British Forces. I have no doubt, therefore, that at the material time, a few days later when the port was captured, if she could fairly be said to be within the port, she

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(1) [1948] W. N. 370; [1948] 2 All E. R. 679, 683.

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Lord Merriman P.

was captured as a ship and not as a piece of wreckage at the bottom of the sea.

Now, was she captured with the port ? This is one of those cases which is clearly a question of degree, and I am bound to say that I think it is on the border line. But Mr. Hogg has convinced me that I can fairly say in the circumstances, including those to which I have just alluded, namely that she was taken where she was and scuttled where she was because we were about to capture the harbour, that this vessel should be taken to have been captured when the harbour itself was captured.

That being so, I am prepared to condemn her ; but I wish to emphasize that progress from one degree to the next must not be taken as likely to proceed indefinitely without check.

Decrees pronounced accordingly.

Solicitor for the Crown : *Treasury Solicitor.*

H. G.

1949
Nov. 1

Lord Merriman P., and Ormerod J.

LAWRANCE *v.* LAWRANCE.

Justices—Desertion—Constructive desertion—Refusal by husband to have sexual intercourse—Wife justified in leaving—Husband guilty of desertion.

A wife who had left her husband complained in a court of summary jurisdiction that he had been guilty of desertion. The justices made an order in her favour, and included in their reasons a finding that the husband had continuously refused her sexual intercourse. The husband appealed.

Held, that the marriage had been reduced to a shadow by neglect and above all by the refusal of ordinary conjugal rights to a wife who ardently desired a child. The fundamental trouble was sexual; and the wife was justified in withdrawing from cohabitation because of the wrongs done to her by her husband in and arising from this vital aspect of married life. By his conduct the husband had been guilty of desertion, and his appeal against the finding of the justices must therefore be dismissed. Dictum in *Baxter* v. *Baxter* [1948] A. C. 274, 290, applied.

Per curiam : A wife is not entitled in such cases to refuse to live with her husband again in any circumstances, for it is open to him to offer to make amends and resume a normal relationship with his wife.

APPEAL from Edmonton justices.

The appellant was a farm labourer, whose wife had left him on June 5, 1949. On June 13, 1949, she took out a summons for desertion and on June 27, 1949, the justices made an order in her favour.

The wife had issued a similar summons in January, 1949, while the parties were living together: this summons had been withdrawn in February after an adjournment with a view to reconciliation. It was stated that a term of this reconciliation was that there should be a resumption of normal sexual relations.

The wife was reported in the notes of evidence which were before the court at the hearing of this appeal to have testified in chief that the parties were married in 1942, that they had no children, and that at the date of the hearing she was twenty-eight and her husband thirty-one. The notes continued: "Differences arose over money matters. Since January, "1949, he has left me a lot alone. He used to have inter-"course perhaps once in three months and then it got to six "months and he left my bed in September, 1948. We came "before the court and we were reconciled in February, 1949, "and he refused any sexual intercourse. He has left me a lot "since he had pigs at his mother's." (It was stated that he used to go to feed them in the evenings.) "He has not taken "me out for three years. He slept with me till three weeks "ago. I have invited him to have sexual intercourse." In cross-examination she said that she knew her husband's nature, that she thought that it would be a long time before he made any effort to have sexual intercourse, and that on one occasion he had said that if she wanted intercourse she should go out in a field and be "bulled." She admitted striking him when he used bad language.

The husband, on the other hand, was reported to have said that his wife would not have sexual intercourse, but he admitted swearing at her and saying that "she wanted a bull." In cross-examination he said that he had not had sexual intercourse with his wife since September, 1948. He again admitted that he had used the expression: "What you want is a bull"; and he referred to his having to go and feed his pigs at his mother's.

A letter, written by the wife about Christmas, 1948, and stated to have been put to her in cross-examination although not referred to in the notes of evidence, was put before the

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Divisional Court by the husband. An extract from that letter was as follows : " The married life we have been leading " is an awful strain on one's nerves. I really have never " said much, have I. Twelve months, then six and so on, " and wanting a child is no picnic to live . . . . I have thrown " it in your face this week, but not before. I have told you " lies, but they are petty things of every married couple's " lives, and if you really loved me, you would do anything " to make me happy but all you seem to live for is your mother " and family and (your employer) and the pigs."

The justices gave the following reasons for their decision : " (1.) The husband appears to have lost all interest in his wife " and has continuously refused intercourse, which has affected " any happiness in the home. (2.) The husband has continually " left his wife at night in a large farmhouse alone, which has " caused her to get into a nervous condition. (3.) The husband " has used bad language and made indecent suggestions to his " wife, and with the two previous paragraphs has materially " caused his wife to leave the home."

Gordon Friend for the appellant husband.

Tudor Evans for the respondent wife.

In discussing the question of sexual relations, reference was made in argument to *Baxter* v. *Baxter* (1) and *Rice* v. *Raynold-Spring-Rice* (2) .

LORD MERRIMAN P. : This is a husband's appeal from an order of the justices for the Edmonton Petty Sessional Division of Middlesex, made on June 27, 1949, in favour of the wife, on the ground that the husband had deserted her. Nothing turns on the question of amount. The sole contest is about the propriety of the order.

It is one of those cases commonly called constructive desertion, in which the wife left the matrimonial home and seeks, nevertheless, to assert that it is her husband who has deserted her. The short outline of the facts leading up to the material point is this : The marriage took place in September, 1942, the husband being an agricultural labourer, occupying a cottage or house in, or adjacent to, the farmyard of his employer. Apparently the appellant had the right to keep chickens ; he also kept pigs at his parents' place about

(1) [1948] A. C. 274.

(2) [1948] W. N. 50 ; 64 T. L. R 119.

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a mile away. It is common ground that for some time before 1949 things had been going badly. There were frequent quarrels, and it is asserted—(and I think not substantially denied)—that on four occasions in all the wife assaulted the husband in one way or another in the course of these quarrels. There is no doubt, either—(and I shall have to refer more particularly to one instance of it)—that the husband used gross and abusive language to his wife. The upshot was that early in 1949 she left him, as a preliminary to taking out a summons on the ground of desertion, which she did not, however, proceed with. It is quite clear from two letters which are said to have been put in before the magistrates, of which copies have been produced before us, that the wife was herself desirous of a reconciliation. Moreover—(and this is not less important)—it is made quite clear by one of those letters what was the fundamental basis of the trouble between these spouses.

I think that there is no doubt what is the real crux of this case: the fundamental trouble was sexual. I am merely stating the matter, for the moment, in a neutral way, without imputing blame one way or the other. It is common ground that there have, in fact, been no sexual relations between the parties since at least September, 1948, and I cannot see on the part of the husband any serious dispute of the evidence of the wife that long before that time sexual relations had been gradually getting more and more infrequent. He referred in his evidence to three-monthly intervals, which had drawn out to six-monthly intervals before he finally left her bed in September, 1948. The wife's grievance is clear beyond the slightest doubt from the letter which she wrote in January, 1949, at or about the time of the first separation. (His Lordship read the letter, which is quoted above, and continued:) The wife's complaint, in effect, is this: The marriage has been reduced to a shadow, to the mere simulacrum of a marriage, by neglect, and above all, by the refusal of ordinary conjugal rights to a wife who ardently desired a child. The same point is made by allusion, though not in direct words, in a shorter note which she wrote about the same time: "If "ever you need me, remember I love you always, but cannot "stand doing half the job of being wife to you. This has "broken my heart . . . ."

Those letters were written before she was persuaded by friends or relatives to withdraw her summons in January, 1949, and resume cohabitation. The effect of her evidence

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was that she had agreed to resume cohabitation on the footing that the appellant would be a husband to her in the full sense of the word, and not force her (to use the phrase in the last letter) to do only half the job of being a wife to him. Her grievance is that until she left him on June 5 of this year, after an attempted reconciliation lasting roughly four months, he made not the slightest attempt to redeem his promise to mend his ways in this vital and all-important question of their physical relationship. There were rows in consequence, the husband exhibited the same neglect and indifference, and the wife left him. The present summons is the result.

About the law on the subject there really cannot be any doubt, and there is nothing new in what I am about to say for, of course, it is all well-settled law; but it so happens that it came to a point at the end of 1947 by the decision of a case in the House of Lords, which was followed immediately (and, I think, quicker than a case has ever been followed before) by a decision of this Court. The case in the House of Lords was *Baxter* v. *Baxter* (1). It is unnecessary to recall the circumstances of that case, but at the conclusion of his speech, which was the opinion of the whole House (of which I happened to be a member), the Lord Chancellor said (2): "I take the view that in this legislation"—(that is, the "Matrimonial Causes Act, 1937, s. 7, sub-s. 1 (*a*))—"Parliament "used the word 'consummate' as that word is understood "in common parlance, and in the light of social conditions "known to exist, and that the proper occasion for considering "the subjects raised by this appeal is when the sexual life of "the spouses, and the responsibility of either or both for "a childless home form the background to some other claim "for relief." There was a case before this court on the eve of the delivery of that judgment—*Rice* v. *Raynold-Spring-Rice* (3)—which was adjourned overnight in order that we might inform ourselves, and that counsel might be informed, of what the Lord Chancellor would say at the end of his speech in the passage which I have read. I do not pretend to have been wholly ignorant of what he was about to say. The print arrived here during the mid-day adjournment and was considered by counsel, the argument was resumed, and our judgment in *Rice* v. *Raynold-Spring-Rice* (3) was based upon the passage which I have read.

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(1) [1948] A. C. 274.

(2) Ibid. 290.

(3) [1948] W. N. 50; 64 T. L. R. 119.

Rice v. *Raynold-Spring-Rice* (1) was an appeal by a wife against the dismissal by the justices of her complaints of desertion and wilful neglect to maintain. The evidence disclosed that the husband had always been anxious to have a family, but that the wife had consistently refused him normal, complete intercourse, and refused to bear him a child. This attitude of the wife led to constant nagging, to displays of bad temper and serious quarrels, and eventually to an announcement by the husband that he had finally decided that it was impossible to live with the wife any longer and to his withdrawal from the matrimonial home. The justices took the view that the wife's conduct was such that normal married life was not possible, that the wife was not genuinely prepared to cohabit with the husband again, and that at the material time the husband was justified in refusing to live with her, and they dismissed the summonses and gave their reasons. We said in the court that we felt unable either to add to or detract from the statement of their reasons, which seemed to us to be unexceptionable, and we confirmed their decision.

About the law on the subject, therefore, there is no doubt: the only question is whether this case comes within that principle. On the wife's evidence it clearly does. I do not think that can seriously be disputed, and the justices have so held. [His Lordship read the justices' reasons and continued:] The only thing in connexion with the husband's language to which I wish to refer is something which he himself admits, and which is quite plainly linked with the wife's version of their sexual life. It was a most filthy and disgusting thing for a husband to say; for what he said was that what his wife wanted was to go out into a field and be "bulled." That was his attitude towards her desire for normal sexual life, and it was to that phrase that the justices were referring.

Upon those findings, if they are justified by the evidence, I should have no hesitation in saying that they come within the principle laid down in *Rice* v. *Raynold-Spring-Rice* (1).

It is, however, contended that the justices had no right to find as they did, and the only doubt I have in this case is whether, particularly during the four months after the reconciliation—for I do not think it is suggested that anything she said or did during the earlier period diminished her rights in this respect—the wife did or said anything which made her the author of her own wrong in this respect, for then, of course,

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(1) [1948] W. N. 50; 64 T. L. R. 119.

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different considerations would at once arise. [His Lordship considered the evidence on this matter and continued:] In my opinion the wife has established her case on the husband's own cross-examination. It is not long, and I will read the whole of it. He says: "It is September, 1948, since I had "intercourse. I did not say I would go back under those "conditions"—(a very obscure sentence, but I think everybody is agreed that it means "I do not agree with my wife's evidence "that she only took me back on my promise to have proper "sexual relations")—"she did not try and make me"—(that clearly refers to the sexual intercourse)—"I have not "put my arms round her neck. I understand I should live "a normal life"—"I said, 'What you want is a bull'"; and then, dealing with the other aspect of the matter, neglect: "I have been out doing my pigs. She has struck me without "provocation. She has struck me because I used too much "fat for cooking." The final question in the cross-examination (and I think one can see the picture of it): "Are you saying "or are you not that you have tried to have sexual intercourse "with your wife and been repulsed?" The answer was: "I have not tried intercourse."

Those few answers in this short record of cross-examination all tend the same way. They all tend to show that the husband knew that the point of the reconciliation was that he should behave properly as a husband in respect of the physical relationship, that he had already very nearly disrupted the marriage by not having done so in the autumn of 1948—to say nothing of the long-drawn-out intervals before that—that he had not, in fact, made any overtures, and that when his wife had reminded him of his promise he had made this insulting reference to her going out to be bulled. In effect, he admitted that from first to last during this reconciliation he had not made any real attempt to reconstitute this marriage by behaving as a normal husband.

In these circumstances, though the case has not been made easier by the sparsity of this note, and is, like all these cases where the sexual life of the parties is involved, one which requires very, very careful consideration, I am satisfied that this wife has proved that she was justified in withdrawing from cohabitation because of the wrongs done to her by the husband in and arising from this vital aspect of married life. In these circumstances this appeal fails and should be dismissed.

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ORMEROD J.: I agree. I think that it is clear from the evidence that throughout the whole of the married life the sexual relations between the parties have never been normal, and I think that it is also clear that when they first parted, they did so because the wife really could not carry on any longer under the conditions which her husband was imposing on her. When they came together after the separation it must have been clear to him that unless he reformed, and lived with his wife the normal life of a married couple, she would not be able to tolerate the position and would be bound to leave him. After the reconciliation the husband, on his own admission, made no attempt to resume anything like a normal relationship with his wife, and under these circumstances, in the end she left him.

It is quite impossible to say that she was anything other than fully justified in putting an end to the state of cohabitation which existed, and I therefore agree that this appeal should be dismissed.

LORD MERRIMAN P., [after consultation with Ormerod J., then said:] My brother and I both think that we ought to add to the judgments we have given this caution, which is probably implicit in what has been said already, and which was actually expressed in *Rice* v. *Raynold-Spring-Rice* (1). In a matter like this it is always open to the appellant to make clear to his wife that he means to be a real husband. This is not a case in which the wife is entitled for all time from now onwards to say "Nothing will ever induce me to live with "my husband again." That is another thing altogether. We wish to make it clear that we are talking about the facts as they are presented to us, and not about any future developments which may or may not arise.

Appeal dismissed.

Solicitors for the appellant: *W. J. Fraser & Son.*
Solicitors for the respondent: *Avery, Son & Fairbairn.*

J. B. G.

(1) [1948] W. N. 50; 64 T. L. R. 119.

Affirmed. TROILUS (CARGO OWNERS) *v.* GLENOGLE [1951] A. C. 820

Affirmed. H.L. [1951] 2 All E.R. 40.

C. A.

1949

Nov. 28, 29, 30; *Dec.* 16.

Bucknill, Somervell and Denning L.JJ.

THE TROILUS.

Shipping—Salvage—Ocean towage—Indian Ocean to United Kingdom—Original salvor substituted by another at Aden—Place of safety—No facilities for repairs to disabled ship or tug services practicable abroad—Towage continued to Falmouth—Whether salvage or towage after Aden—Liability of cargo owners to contribute to salvage award.

On July 2, 1948, the single-screw motor vessel *Stentor*, when in the Indian Ocean, went, in answer to calls for assistance by the steamship *Troilus* (which had lost her propeller but was otherwise unimpaired), and towed her to a safe anchorage in the port of Aden on July 12. The dispatch of a new propeller from the United Kingdom and the facilities available for the refitting of it at Aden, Suez or Alexandria were considered by the owners of the *Troilus* to be impracticable. They decided that she should be taken in tow all the way to the United Kingdom; that it would be more expedient for the *Stentor* to proceed on her normal voyage; and that the *Glenogle*, a twin-screw vessel under the same management, should take the place of the *Stentor* in rendering the required service to the *Troilus*. Accordingly, the *Glenogle*, on July 14, began the tow to Suez where, on arrival, the *Troilus* was taken through the Canal by the Canal Company's tugs to Port Said. There the towage was resumed by the *Glenogle* on July 29 towards the United Kingdom, where both vessels arrived in Falmouth Bay on August 15.

In an action claiming salvage by the owners, masters and crews of the *Stentor* and *Glenogle* against the owners of the *Troilus*, her cargo and freight, Lord Merriman P. made awards on a salvage basis. The owners of the *Troilus* accepted his decision, but the owners of the cargo on board that ship appealed against the award in favour of the *Glenogle* on the ground that the voyage from Aden or, at any rate, from Suez, was merely an ocean towage, and that they were therefore not liable to contribute to an award made on a salvage basis. On appeal:

Held, (1.) that, the *Troilus* admittedly being in a state of danger when she was picked up with a lost propeller by the first salvor (the *Stentor*) in the Indian Ocean, the onus was on her owners to prove that the state of danger had come to an end when the ship was brought to the anchorage off Aden. (2.) that, as the *Troilus* appeared to have come to anchor there merely as a temporary measure pending the resumption of the service and not to have taken the necessary steps to remain at anchor in a permanent and secure anchorage, the state of "danger" (within the meaning given to that word in salvage law) remained when the second salvor (the *Glenogle*) started to take the *Troilus* in tow, in place of the *Stentor*, towards the United Kingdom. (3.) that, with regard to the cargo interests, failure by the shipowners to adopt certain possible alternatives, such as the discharge of the cargo and the dry-docking abroad for re-fitting of a new propeller, did not affect the question whether the service was a salvage or a towage service, once it was established that the services rendered saved the property from danger, and that the services rendered in the present case were salvage and not towage.

Per Somervell L.J. In principle and on the authority of *The Syria* (1874) Shipping Gazette, July 7, 1874, a call at one or more intermediate ports, where the disabled vessel may lie in complete safety in the ordinary sense of the word, for one or more nights, will not change the character of the service and convert it from salvage to towage. A disabled ship, though temporarily safe, is still in distress because she cannot unaided reach her port of repair. A disabled vessel at a temporary resting place en route where she cannot be repaired is still valueless where she is, although there may be a safe anchorage for her. The distress caused by the original accident continued in the sense that without assistance the *Troilus* could not reach her destination, or some port of repair.

Per Denning L.J. If the shipowner, having the choice before him of accepting salvage services or some other alternative, contracts to pay for the services on a salvage basis, that is his affair; but he cannot, by so doing, make the cargo owner liable for salvage unless the services are really salvage Applying those principles, there was much to be said for the view that the services rendered by the *Glenogle* were towage and not salvage. It seemed that at Aden, or, at any rate, at Suez or Port Said, the ship was safe and the owners had a freedom of choice. The decision must depend on the view taken of the facts.

Decision of Lord Merriman P. affirmed.

APPEAL from Lord Merriman P.

The owners, masters and crews of the motor vessels *Stentor* and *Glenogle* claimed salvage for services rendered to the steamship *Troilus*, her cargo and freight, in the Indian Ocean and Red Sea and for the final service from Port Said to Falmouth Bay during the months of July and August, 1948.

Lord Merriman P. made awards of 18,000*l.* in respect of the services of the *Stentor*, and 22,000*l.* in respect of the *Glenogle*. The owners of the *Troilus* did not appeal from those awards. The owners of the cargo on board the *Troilus* now appealed only against the award to the *Glenogle*.

The material facts are summarized in the headnote and are stated fully in the judgment.

Nelson K.C. and *Vere Hunt* for the cargo owners. The onus of proof that the services rendered by the *Glenogle* were salvage is on the party claiming salvage. Salvage consists in the rescue of a vessel from a position of some risk; taking a vessel from one safe position to another safe position does not give rise to salvage. Towing the *Troilus* from Suez to Falmouth was no more a salvage than towing her from Falmouth to dock, even if the repairs could only be effected in this country.

[BUCKNILL L.J. If the *Troilus* had been lost while being taken from Port Said to Falmouth, would the owners of the *Glenogle* have had a right to claim on a quantum meruit, or would it have been considered as salvage on a "no cure, "no pay" basis?]

The owners of the *Troilus* could not have agreed that the service from Port Said to Falmouth should be on a salvage basis without the consent of the cargo owners; if the *Troilus* had been lost between Port Said and Falmouth the owners of the towing vessel would have had an absolute right for payment for their services on quantum meruit. The President has taken the business man's view of the position of the *Troilus*: he attached importance to what a prudent owner of a disabled vessel would do having regard to his own interests and the interests of the cargo owners. The judgment of Willmer J. in *The Glaucus* (1) is open to criticism. Salvage services do not arise where a ship is towed from a place where she is not in distress to a place where she can be repaired.

[BUCKNILL L.J. Towage services are based on contract. Where is the contract for the services rendered by the *Glenogle* from Port Said to Falmouth?]

Salvage must be connected with the safety of the vessel; once a vessel has reached a safe place she passes outside the sphere of salvage.

[SOMERVELL L.J. Was the *Troilus* in safety at Aden? Were the dangers resulting from her disabled condition at an end?]

A vessel must be in distress in the judgment of the master. Nothing of that condition appeared here. There is no ground for saying that the services rendered after the *Stentor* had left the *Troilus* at Aden (a place of safety) were salvage services. The master of the *Troilus* would have acted improperly if he had agreed to engage the *Glenogle* to tow his vessel from Suez to Falmouth on a salvage basis.

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(1) (1948) 81 Ll. L. Rep. 262.

[*The Reward* (1); *The Princess Alice* (2); *The Saratoga* (3); *The Germania* (4); *The Laomedon* (5) referred to.]

With regard to the cargo in particular, the risk to it and the risk to the ship are severable. At Suez the *Troilus* could have been taken alongside the quay and the cargo could have been discharged. In any event the cargo was safe in three places, namely, Aden, Suez and Port Said.

Naisby K.C. and *J. B. Hewson* for the claimants. The question raised as to the severable liabilities of cargo and ship for salvage is not before this court, nor was it in issue at the trial in the court below. The question is: is the salvor entitled, in this case, to an award? Where a ship deviates from her normal voyage and runs into danger by so doing, and the master is compelled to take salvage services, then the whole of the interests of ship and cargo would be called on to pay. The salvor would have a possessory lien on ship and cargo. It is clear that salvage will be awarded for services which consist in taking a disabled vessel from a place of danger to a place of comparatively greater safety. The towage of a disabled ship is always salvage unless some other contract is made. This ship and her cargo were in danger at Aden; and the danger to which she was exposed, though varying in degree, existed all the way to Falmouth. Neither vessel nor cargo were of proper use to their respective owners until they had arrived at a port where repairs could be effected within a reasonable time. The decision in *The Syria* (6) in 1874 appears, so far as the facts go, to be in the claimants' favour.

[SOMERVELL L.J. You can put your case in two ways: the salvage services continue until you reach either (1.) a convenient place of safety or, (2.) a place where repairs to the disabled vessel could be effected.]

You must consider the adventure (both ship and cargo) as a whole, and what a prudent shipowner would do in the interests of both. No distinction as to what is a "safe port" can be drawn between a port which is safe for the cargo only, and a port which is safe for the ship only. The two separate interests must be treated as one. If it is not safe for one, it is not safe for both. The cargo owners contend that the cargo was safe at Aden; the ship while there was exposed to danger which would justify a salvage award. It is true that she could have been left there, but indefinitely immobile and useless.

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(1) (1841) 1 Wm. Rob. 174.

(2) (1849) 3 Wm. Rob. 138.

(3) (1861) Lush. 318.

(4) [1904] P. 131.

(5) (1925) 23 Ll. L. Rep. 230.

(6) (1874) Shipping Gazette, July 7, 1874.

[SOMERVELL L.J. There must be a casualty to give rise to salvage; the object of giving awards for salvage is to encourage ships to render assistance to one another when in danger.]

Nelson K.C. in reply.

Cur. adv. vult.

Dec. 16. The following judgments were read.

BUCKNILL L.J. This is an appeal by the owners of cargo lately laden on board the steamship *Troilus* against an award of 22,000*l.* by the President in an action brought by the owners, master and crew of the motorship *Glenogle* for salvage services rendered by them to the steamship *Troilus*, her cargo and freight. The award is in respect of services to the ship, cargo and freight, and the owners of the cargo on board the *Troilus* are normally liable to pay such part of the total award as is proportionate to the values of the salved property. These values were agreed at: ship 193,350*l.*; cargo 888,000*l.*; and freight at risk 15,410*l.* There is no appeal by the owners of the *Troilus* from the award of the President.

The material facts were not in dispute. On July 2, 1948, the *Troilus*, when in the Indian Ocean and about 1,050 miles from Aden, bound from Australia to Liverpool with a general cargo, lost her propeller by fracture of the tail shaft at the end of the stern tube. On July 5, the motor ship *Stentor* took the *Troilus* in tow and towed her to Aden, and the *Troilus* dropped anchor in the quarantine anchorage there on the evening of July 12. The position of the *Troilus* when at anchor was about twelve cables North Eastward of the Pinnacle Rock in about five fathoms of water.

Alfred Holt and Co. Ld. are the managers of the *Troilus* and of the *Stentor*, which are both owned by the Ocean Steamship Co. Ld. They are also managers of the motor vessel *Glenogle* owned by the Glen Line Co. Ld. On July 9, the managers had by wireless asked the master of the *Glenogle* whether he could tow the *Troilus* from Aden to Liverpool, and the master of the *Glenogle* replied "Yes." The *Glenogle* is a twin-screw motor ship of 9,513 tons gross register and was bound from Australia to the United Kingdom with a general cargo. On July 13, the master of the *Troilus* told the master of the *Stentor* (who was then ready to resume towage to Suez) that he would not be ready for two days, and on the 14th the owners of the *Stentor* instructed her master to proceed on his voyage if the master of the *Troilus* were satisfied to lie at anchor off Aden. On the same day the managers sent instructions to the *Glenogle* to tow the *Troilus* to the United Kingdom. The *Stentor* then proceeded on her voyage. The *Stentor* had a single screw, whilst the twin screws of the *Glenogle* presumably made her more efficient for towing purposes. The *Stentor* also had to call at various ports in the Mediterranean en route for England.

In the present action the owners, master and crew of the *Stentor* claimed salvage for services rendered to the cargo in the *Troilus*, and her master and crew also claimed salvage for services to the *Troilus* herself. The President awarded the sum of 18,000*l.* in respect of these claims. There is no appeal from that award.

On July 16, the *Glenogle* arrived at Aden, and on the 17th made fast to the *Troilus*, which had remained at anchor in the same position, and started to tow her to Suez. The *Troilus*, which was an American Liberty ship, was not carrying a spare propeller and tail shaft, but there was a spare of each in England. The managers considered the question of sending these spares out to the *Troilus*, and made inquiries for that purpose. On July 16 they received a cable from Port Said to say that the engineering works there could fit the spare propeller to the *Troilus* by tilting her stern sufficiently to clear the shaft aperture above the water line, and estimated the time, including the handling of cargo, at a month. On July 20, the managers inquired whether a dry dock at Malta was available for the *Troilus* on about August 1, and the reply was that no docks were available before the end of September. On July 21 they cabled to Port Said to ask whether a dry dock was available at Alexandria for the *Troilus* to be docked with cargo on board, and received the reply on the 22nd—" suitable dry dock not available before August 15 "not guaranteed do not recommend."

On or about the 22nd the managers also inquired whether there was any suitable tug in the locality which could tow the *Troilus* to the United Kingdom, and ascertained that the tug *Empire John* belonging to William Watkins Ld. would be available at Taranto on or about July 30, and would be able

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to tow the *Troilus* at approximately 4 knots. The owners of the tug gave a quotation of 6,000*l.* to tow the *Troilus* from off Malta to Liverpool. The managers, however, were unwilling to entrust the ship to one tug for towage across the Bay of Biscay, and decided that the most satisfactory course, in the interests of all concerned in the safety of ship and cargo, was for the *Glenogle* to tow the *Troilus* to Falmouth.

The *Glenogle* towed the *Troilus* to Suez, which was reached on July 25, at an average speed of 6.8 knots. Tugs then towed the *Troilus* through the Suez Canal, and on July 29 the *Glenogle*, having gone through the Canal ahead of the *Troilus*, made fast to her outside Port Said and continued with the towage. On August 3 the vessels were near Malta, and on that day tug and tow were proceeding at a speed of 8½ knots. On the 8th they passed Gibraltar, and on August 15 they reached Falmouth Bay. The *Troilus* then anchored and was subsequently towed to Liverpool by two tugs. The average speed of the towage from Port Said to Falmouth, a distance of 2,980 miles, was 7.3 knots. The cargo owners admitted that if the claim of the *Glenogle* was in salvage, the amount of the award was not excessive.

Before this court the main point taken by Mr. Nelson, on behalf of the cargo owners, was that the ship and her cargo were in safety when at anchor at Aden, and that, if towage of a ship without a propeller starts when the ship is in safety, it is not in its inception at any rate, a salvage service, but merely towage. It may be converted into salvage during the service for the reasons indicated in *The Minnehaha* (1), but it starts as towage. And if it is merely towage then in my opinion (*a*) the master and crew of the " tug " have no claim against the " tow " or her cargo ; (*b*) the value of the property towed is immaterial when the court fixes a reasonable remuneration for the towage ; and (*c*) the owners of the " tug " have no direct claim against the owners of the cargo for towage remuneration, but must look for payment to the owners of the " tow " with whom the towage contract has been made.

The first question, therefore, is this : was the *Troilus*, when at anchor in Aden, in such a position of safety that removal from that position was merely towage and not salvage ? The President, on this point, held that she was not then in a safe position, and that she was in danger. He said in his judgment : " I do not think that there is any dispute, so far

(1) (1861) Lush. 335.

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" as the 1,300 miles from Aden to Suez is concerned—there " certainly has not been any dispute about it in this court— " that that also was a salvage service. For one thing " Mr. Nelson expressly admitted that, in substance, he could " not distinguish this case from that of *The Glaucus* (1) " decided by Willmer J. As to that I agree, and I gladly " follow that case, not merely because I ought to follow it " unless I see some very good reason to the contrary, but " because it seems to me that it is right. Nobody can possibly " pretend that for a ship of the size of the *Troilus* and in the " circumstances of this case, taking them quite broadly, " Aden was a safe port of refuge. She was not allowed into " the inner harbour there, she had to anchor in the quarantine " area, and that was manifestly an arrangement which could " only last for a short time. She was not really in a safe " position there, and if something bad in the way of weather " had occurred she might have been in very great danger."

I have not been able to find in the statement of the master of the *Troilus* any reference to a request by him or refusal to him to anchor in the inner harbour, but the President may have been referring to some statement by the master of the *Stentor* which was before him but was omitted from the record before us.

In *The Glaucus* (1) the facts were very similar to those of the present case, except that the *Glaucus* did not lose her propeller but at sea suffered serious damage to both her main boilers and was unable to steam until she had extensive repairs. The *Rhesus* towed her to Aden, and she was anchored in the quarantine anchorage on January 9. There were no adequate repair facilities at Aden, and on January 16 the *Antenor* took the *Glaucus* in tow and towed her to Suez. The question raised in argument was whether the *Glaucus*, while at anchor off Aden, was in danger. On that point Willmer J. said (2): " It is said that a position of safety having been " reached at Aden, any subsequent services could not in any " event be regarded as salvage services. I am not going to deal " at great length with that point, having reached a very clear " conclusion on the matter . . . . In this case at all material " times the *Glaucus* was a damaged ship. She was incapable " of any manœuvres whatever under her own power, and in " those circumstances it seems to me both as a matter of " authority and as a matter of common sense that I must

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(1) (1948) 81 Ll. L. Rep. 262. (2) Ibid. 266.

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" regard her as being still in a position of danger when she had " been taken to Aden."

The judge pointed out that if a fire had started in the ship the danger would have been much greater to her because she had only steam available from a donkey boiler as compared with a ship that had steam available from her main boilers. He also pointed out that if the ship, while at anchor, had been set adrift by some casualty, she would have no power to manœuvre and regain a position of safety. Willmer J., finally said: " Quite apart from the physical danger, there is " this to be added, that until somebody got her to a place " where the necessary repairs could be executed she was " completely immobilized. It is no use saying that this " valuable property is safe, if it is safe in circumstances where " nobody can use it."

In the course of his judgment Willmer J. said that the case was governed by the principles stated in Kennedy on Salvage (3rd ed.), p. 25. It is there stated that the rule in regard to towage of a ship which has received damage is to be gathered from the judgments of Dr. Lushington in *The Reward* (1) and *The Princess Alice* (2).

It is, I think, material to consider the facts in these cases. The *Reward* was driven by a violent gale on to a bank. The next morning, the weather having moderated, she was backed off the sand by means of her sails with the loss of her two best anchors and cables, and the starboard end of the windlass and bulkhead carried away. Whilst proceeding for Sheerness to repair the damage she accepted the services of a tug which towed her to the West India Docks.

The report of the judgment on the question as to salvage is as follows: " In the course of the argument it has been " contended by the counsel for the owners, that the service " which has been rendered in this case is a mere towage service; " and that the sum of 17*l*., which has been tendered, is a " sufficient remuneration, being at the rate established for " towing a vessel from the Nore to London, according to a " printed scale of the company to which the *Nelson* belongs. " In my judgment, the service of the salvors is a service of " a higher nature. I apprehend that mere towage service " is confined to vessels that have received no injury or damage, " and that mere towage reward is payable in those cases

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(1) 1 Wm. Rob. 174, 177.

(2) 3 Wm. Rob. 138.

"only where the vessel receiving the service is in the same "condition she would ordinarily be in without having "encountered any damage or accident."

It must be pointed out, however, that the *Reward* had lost her means of anchoring in safety, and was in that respect different from a ship securely anchored when the towage starts.

In *The Princess Alice* (1), it is again necessary to remember the facts which led to the judgment. The *Princess Alice*, whilst making for the Tees in a heavy sea, struck heavily on the ground, where she remained for some twenty minutes. She then came off the sand and was driving before the sea towards another sandbank, when the tug succeeded in making fast to her, pulled her head round clear of the sand and towed her into the channel. On the other hand, the defendants alleged that the weather was moderate, and that there was no danger whatever of the ship's being driven on to the sandbank.

On these disputed facts the judge found no salvage, and in the course of his judgment said (2): "What is the "question which I have to determine? It is this, whether the "steamer, the *Conquest*, performed more than a towage service, "it being acknowledged that a service to this extent, at least, "was rendered. In order to solve this question, I now must "consider in the outset what are the principles which "distinguish a salvage service from a mere service of towage, "as they have been laid down and adopted in former decisions "of this court. Without attempting any definition which "may be universally applied, a towage service may be "described as the employment of one vessel to expedite "the voyage of another, when nothing more is required than "the accelerating her progress. Many circumstances, it is "obvious, may arise in the course of such employment, which "may convert the service into the character of a salvage "service. As for example, where the ship in tow is disabled "in her hull or rigging, or where she is aground, or where the "service itself is necessarily attended with danger, or "extraordinary labour to the towing vessel. The distinguishing "circumstances in each particular case require careful and "minute consideration; and it is due to the commercial "interest in general that they should at all times receive "that consideration from the court. On the one hand, to

(1) 3 Wm. Rob. 138. (2) Ibid. 139.

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"protect the shipowners from unjust and unnecessary payments; on the other hand, to afford due encouragement "to the owners of towing vessels to afford that assistance "which is so highly beneficial to the general interests of "commerce."

I may also refer to *The Batavier* (1) and to *The Kingalock* (2). In those cases the ship was at sea and had suffered some damage which might affect her safety if left without assistance. There is, to my mind, a crucial difference between a ship at sea which is wholly or partly disabled and a ship lying safely at anchor where her disablement no longer is material to her safety.

Kennedy L.J. in his classic work on Civil Salvage stated that, upon the important question of the nature of the circumstances that will constitute that condition of danger which is most essential in salvage, the judicial statement which is most often quoted is that of Dr. Lushington in *The Charlotte* (3). In that case the ship came to anchor by an error of her master in an exposed position off the coast of County Cork in bad weather, and started to drag her anchors. Accordingly her crew cut away her masts, which went overboard with all her sails and rigging, and her anchors then held. On the following day the salvors towed her into Long Island Channel where she came to anchor and was in a place of safety. Dr. Lushington in his judgment said: "Looking "to these facts, ... I cannot but think that the service "of bringing this vessel to anchor in Long Island Channel "was prima facie a service of salvage. According to the "principles which are recognized in this court in questions "of this description all services rendered at sea to a vessel "in danger or distress are salvage services.

"It is not necessary, I conceive, that the distress should "be actual or immediate, or that the danger should be "imminent and absolute; it will be sufficient if, at the time "the assistance is rendered, the ship has encountered any "damage or misfortune which might possibly expose her to "destruction if the services were not rendered." This passage received the approval of the Judicial Committee of the Privy Council in *The Strathnaver* (4).

Again, it must be pointed out that in *The Charlotte* (5) the vessel was taken from an anchorage in which she was clearly not safe, to an anchorage where she was safe.

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(1) (1853) 1 Spinks, 169.
(2) (1854) 2 Spinks, 263.
(3) (1839) 3 Wm. Rob. 68, 71.
(4) (1875) 1 App. Cas. 58, 65.
(5) 3 Wm. Rob. 68.

I do not criticize adversely the conclusion reached by Willmer J. in *The Glaucus* (1) on the particular facts of the case, but I dissent from the general proposition, which, as I understood the argument, was presented to us on behalf of the claimants, that there was an established principle or rule that a steamship which has lost her propeller by an accident remains in a position of danger after she has come to anchor, and therefore that any volunteer who removes her from that anchorage to a place of safety is entitled to remuneration on a salvage basis. I do not think that there is such a principle or rule. It cannot reasonably be suggested, as I think, that a ship which has lost her propeller remains in danger, however securely she is anchored, moored at buoys or tied up at a quay in a sheltered harbour.

When one is considering solely the question of danger to a ship, there seems to be no material difference between a ship whose propeller has been removed by design, and a ship whose propeller has fallen off by accident.

The question whether the *Troilus* was in danger whilst at anchor, within the proper meaning of that word as applied to salvage, is surely a question of fact. Such danger need not be immediate. In the present case it is admitted that the *Troilus* was in danger when taken in tow by the *Stentor*, although the master of the *Troilus* said in his statement: "We were in no immediate danger when the services "commenced and could have continued to drift almost "indefinitely without risk."

The question therefore is whether, in the particular circumstances, the *Troilus* was in danger whilst at anchor off Aden. Mr. Nelson argued that the onus of proving that the ship was in danger "lay strongly and justly" on the salvors, to use the words of Dr. Lushington in *The Wilhelmine*(2) (see also Kennedy on Salvage, 3rd ed., at p. 20). But I think that in a case such as the present, where the ship admittedly became in a state of danger when she lost her propeller, the burden is on her owners to show that that state had come to an end before the *Glenogle* started to tow her.

How does the matter stand in that aspect of the case? Mr. Nelson argued that the very size of the award to the

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(1) 81 Ll. L. Rep. 262.

(2) (1842) 1 Notes of Cases, 376.

Stentor indicated that she had taken the *Troilus* to a place of safety; but I do not think that that argument is convincing, because we do not know all the facts about the salvage service of the *Stentor*. Salvage is awarded to salvors who merely bring the salved property to a place of comparative safety provided that the property is subsequently brought to a place of complete safety.

The evidence as to the danger to the *Troilus* whilst at anchor is meagre. No evidence was given as to the nature of the holding ground, the number or size of anchors and lengths of cables with which the vessel was equipped, as to the state of the weather at Aden after her removal from her anchorage, or as to the number and capacity of any tugs in Aden Harbour which could if necessary have removed her into the harbour. The only evidence bearing on the point is contained in the written statement of the master of the *Troilus* and in the admitted paragraphs in the statement of claim on behalf of the *Stentor*.

The following appears to be a summary of the evidence on the point from those sources. [His Lordship discussed the evidence and continued :] In these circumstances was the *Troilus* in danger within the meaning given to that word in salvage law, when the *Glenogle* started to take her in tow at Aden ? On the whole, I think that she was, and that the danger which arose when she lost her propeller had not entirely passed. She appears to have come to anchor merely as a temporary measure pending the resumption of the service, and not to have taken the necessary steps to remain at anchor in a permanent and secure anchorage.

The second point taken by Mr. Nelson on behalf of the cargo owners was that, even if the *Troilus* was in some danger at Aden, she and her cargo were, at any rate, in absolute safety as soon as she reached Suez and was handed over to the Canal tugs, and that the salvage services then ended.

There are, however, several decided cases to the contrary effect, the earliest one which was brought to our notice being *The Syria* (1) decided in 1874 by Sir Robert Phillimore. A summary of the case is given in vol. II. of Pritchard's Admiralty Digest, and we were able to obtain from the Admiralty Registry a copy of the pleadings and a copy of the report in the Shipping Gazette of the hearing and judgment.

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(1) (1874) Shipping Gazette, July 7, 1874.

It appears from those records that the owners of the *American* brought an action for salvage against the owners of the cargo on board the *Syria*, and the owners and the master and officers and crew of the *American* in the same action also brought an action against the *Syria*, her cargo and freight. The *Syria*, whilst bound from Cape Town to Southampton, broke her main shaft and sustained other damage, whereby she was totally unable to use her machinery. She then set sail and after sailing 466 miles reached the Island of Ascension. Then she anchored in the Roads, and subsequently, with the assistance of a tug, made fast to a buoy and also let go an anchor. The crew then tried to secure her propeller which revolved when the ship was under sail and did damage to the stern, but these efforts were not successful, and it was decided to take towage assistance.

Accordingly the *American*, which belonged to the same owners as the *Syria* and was bound from South Africa to England, went to Ascension, and at the request of the *Syria's* master to the *American* to tow his ship away from Ascension, made fast and took her in tow. The two vessels arrived at Goree on February 4, where the *American* took in bunkers, and left again on the 6th with the *Syria* in tow. The *American* towed her to St. Vincent where the two vessels were placed in quarantine, and where they remained for five days, the *American* taking in more bunkers. Then they went on to Madeira, where the *American* took in more bunkers, and they left the following day for Southampton, and duly arrived off Netley, where the *Syria* was anchored in safety.

The statement of claim alleged that it was impossible for the *Syria* to have got away from Ascension without towage assistance, and that, if she had been allowed to remain there in her helpless condition, in all probability she would have been lost together with all her cargo. The defence, on the other hand, alleged that the *Syria* and her cargo were not in any imminent danger at the time of the arrival of the *American* at Ascension, and that the ship would probably have remained safely at anchor there for a long time without assistance. They also pleaded that when the *Syria* had been towed to Goree she and her cargo were placed in safety, as they were again at St. Vincent and Madeira, and that the services of the plaintiffs, after the arrival of the ships at Goree, were rendered for the purpose of expediting the *Syria* on her voyage, and to enable the owners of the *Syria* (who were also the owners of the *American*) to get the *Syria* home and to earn their freight for the carriage of the *Syria's* cargo; that the cargo might, if necessary, have been landed or transhipped at Goree, St. Vincent or Madeira; and that the services, after the arrival at Goree, were in the nature of towage and not salvage services. In the course of his judgment Sir Robert Phillimore said: "First "of all the question is whether salvage remuneration is due "for towing the *Syria* the whole distance from Ascension "Island to Southampton, or whether salvage remuneration "is only due for towing the vessel from Ascension Island to "St. Vincent, inasmuch as it is admitted and proved that there "had been a safe anchorage there for her and that the salvage "was towage . . . . I have paid all attention to Mr. Butt's "argument with respect to the point that the salvage ceased "at St. Vincent, but I am unable to assent to it. I put "out of consideration the fact that both the vessels belonged "to the same owners. The principle of law is independent "of that fact. This service was simply salvage service and "it was intended to extend to towing this vessel to her port "of destination; and the fact that she touched at a port "where she might have remained in safety does not seem "to alter the original contract, and make the service cease "there or begin there. What the question might have been "in a case where the master of a towed vessel expressed himself "satisfied and did not wish to be towed further, and made "no arrangement by implication or parol is another consider-"ation altogether. I must consider it as a salvage service "extending over the whole six weeks . . . . The defendants "have been liberal in their admission that the *Syria* was not "in imminent danger and that there would have been danger "in remaining. I am inclined to think that there was no "great peril to her where she was. But I must take it that "though she was in no immediate danger, her continuing "to remain there would have placed her in some amount of "jeopardy."

The principle applied in *The Syria* was adopted by Bateson J. in *The Idomeneus* (1). In that case the *Idomeneus* broke her propeller shaft about 90 miles off Port Sudan. In response to a wireless message, the *Perseus* went to the *Indomeneus* and towed her to Port Sudan. There the *Perseus* picked up cargo, and subsequently towed the *Idomeneus* to Suez, about

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(1) (1925) 22 Ll. L. Rep. 299, 300.

630 miles away. At the trial, counsel for the defendants argued that the towage into Port Sudan was the only real salvage, and that the ships went to Suez for the convenience of the owners of both ships. Bateson J. in the course of his judgment said: "It is quite true that the principal salvage "was getting the *Idomeneus* into Port Sudan to start with, "but for the long tow the *Perseus* has to be paid as a steamer "rendering a service, and it is really an ocean tow, and, "therefore, must be properly remunerated as salvage."

In *The Laomedon* (1), Hill J. decided the same kind of point in the same way, as was pointed out by the President in his judgment in the present case.

It seems to me that it would be very inconvenient, and prejudicial to the salvage of property at sea and to "the "general interests of navigation and commerce," (words used by Sir John Nicholl in *The Industry* (2)), if a salvage service were held to come to an end as soon as the salved ship in the course of the service was taken into a position of temporary safety. For instance, a tug picks up a disabled ship in Eastern Mediterranean and is engaged to tow the ship to Marseilles on a no cure, no pay, basis. Then in the course of the service bad weather sets in and the tug takes the tow into Malta for shelter, and they stay there for a few days. Whilst in Malta the ship is safe from any marine peril, and I presume that her master might change his mind and tell the tug that he did not require his services any more. But if he did not do so, and the tug towed him to Marseilles, I cannot think that the owners of the tow could then say that the salvage service ended at Malta and the rest of the service was mere towage, even though the towage from Malta to Marseilles did not involve tug or tow in any special risks.

Mr. Nelson also took the point that the salvage of the ship and cargo could have been carried out much more cheaply and just as effectively by discharging the cargo at Suez and putting the ship into dry dock there, or by tipping the ship at Port Said, or by engaging the *Empire John*, or by dry docking at Alexandria. Our assessors advise us that in their opinion it would be imprudent to dry-dock this ship without discharging the bulk of the cargo. They also think that it would be imprudent, and probably impossible, to tip the ship enough to fit the propeller. In my opinion these possible alternatives do not affect the question whether the service was a

(1) (1925) 23 Ll. L. Rep. 230. (2) (1835) 3 Hagg. Adm. 203.

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salvage service or a towage service, once it is established that the service saved the property from danger. The fact that there are alternative and cheaper ways of saving the property may reduce the amount of the award, because such alternative ways may affect the degree of danger. A ship which loses her propeller is obviously in less danger if there are many ships at hand ready and able to salve her than she would be if there were no other help available than the ship which saves her. I have no doubt that the President took these alternative methods into consideration in making his award.

Another point was made by junior counsel for the cargo owners which was not taken before the President and which, I think, strictly speaking, was not open to them. The point was that the cargo of the *Troilus* could have been discharged at Suez or Port Said, and would then be removed from the danger which attached to it whilst in the holds of a helpless ship. But there was no evidence before the court as to the storage facilities of cargo at Suez or Port Said, or the possibility of engaging another ship to bring the cargo on to its destination, or the cost of discharge and reloading. The damage done to the cargo during these operations might be very considerable, and one must bear in mind that its total value was 888,000*l*. No one suggested such a course at the time.

Another point put forward by Mr. Nelson was that it was unreasonable for the agents of the owners of the *Troilus* to engage the *Glenogle* to tow the *Troilus* and her cargo to Falmouth without stipulating that the towage should be at a fixed rate on a towage basis. I cannot see that there is any substance in this point. The arrangement did not stipulate for any terms, salvage or towage. That was left at large to be decided afterwards. If the owners of the ship had made any arrangement which was binding on the owners of the cargo and which was unreasonable, I think that the owners of the cargo would have their remedy at law against the owners of the ship, but I do not think that the arrangement which was made in this case was unreasonable.

For these reasons I think that this appeal should be dismissed.

SOMERVELL L.J. I have had the advantage of reading Bucknill L.J.'s judgment and there are very few observations which I wish to make. When a ship becomes disabled at sea, the service which her owners require, is that she may be taken to her destination or to a port where she can be repaired and made seaworthy. I am assuming that her owners wish her to be so repaired. One can, I suppose, imagine a case where the only thing to be done was to get her to some place where she could be broken up and her cargo, if any, discharged. There may, of course, be arguments, at any rate between ship and cargo, as to whether there was a port of repair nearer to the scene of the accident to which she ought to have been taken, so diminishing the cost of the salvage. I will assume, however, that there is no dispute that a ship damaged on the high seas at point A has to be got to port Z, which may or may not be her destination, in order to be repaired. I will assume that one vessel performs the entire task of towing her there. On these facts it seems to me, in principle and on the authority of *The Syria* (1), to which Bucknill L.J. has referred, that a call at one or more intermediate ports, where the disabled vessel may lie in complete safety in the ordinary sense of the words for one or more nights, would not change the character of the service and convert it from salvage to towage. The disabled ship, though temporarily safe, is still in distress, because she cannot unaided reach her port of repair. This, I think, is the principle adopted by Willmer J. in his final conclusion in *The Glaucus* (2) which has already been quoted. To adopt the other view would, as it seems to me, be very disadvantageous in the interests of all concerned. A salvor might find his position prejudiced if he took the disabled vessel into a port en route in order to give her crew much needed rest, or to pick up stores, or because of bad weather, or because the salving vessel had to discharge or pick up cargo there. If, then, the *Stentor* had taken on the *Troilus* from Aden, I should have regarded the question whether she was in danger in the place in which she was anchored at Aden as irrelevant.

Does it become relevant because the *Stentor* left her and the *Glenogle* picked her up ? It is not necessary to decide that point in this case, because I agree with Bucknill L.J., for the reasons he has given, that she was in danger as she was anchored at Aden. I will, however, state the arguments which appealed to me for the proposition that the appeal would have failed even if at Aden she had in fact been anchored in some place where she could have (as far as could be foreseen) remained indefinitely safe as a hulk. It is not suggested that she could have been repaired at Aden. I am discussing a case, such as the present, where the original damage is done on the high seas, so that it is clear that the original transit to the place of safety was salvage. A salvage service can be performed by two successive salvors. If the second stage, in this case from Aden to Suez, is done by a second towing vessel, does the question whether that is salvage depend on whether she was " safe " or in some danger at the intermediate place where the second vessel took over? It is suggested that so to hold would disregard two important points, which I will formulate as follows: first, a disabled vessel at a temporary resting place en route, where she cannot be repaired, is still valueless where she is although there may be a safe anchorage for her, as there was for the *Syria* (1) at St. Vincent. Second, although she is temporarily in safety, the distress caused by the original accident continues in this sense, that she cannot without assistance traverse the high seas to her destination or some port of repair. One has also to bear in mind *The Reward* (2) and *The Batavier* (3) and the statement of the law on " towage " in *The Princess Alice* (4), which have already been referred to. I was myself impressed by the argument, and feel that it may be illogical to hold that the salvage service continues, notwithstanding a temporary resting place of safety, if the service is done by one vessel, but that a second vessel which completes the service cannot claim to be a salvor because she took over in a place of safety.

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(1) The Shipping Gazette, July 7, 1874.

(2) 81 Ll. L. Rep. 262.

I have nothing to add to what Bucknill L.J. has said on the other points in the case.

DENNING L.J. The obligation on ship and cargo to pay for salvage services is imposed by law irrespective of any contract, express or implied, to that effect; whereas the obligation to pay for towage services arises, if at all, from a contract, express or implied, to pay for them. This difference points the way to the true distinction between the nature of the services. Salvage services arise when the ship is in such danger that the master has no real choice in the matter but must, as a reasonable man, accept them from somebody or lose his ship, or leave it in some remote place; whereas towage services arise when the ship has reached such a position of safety that the shipowner has a freedom of choice either to refuse the services or to have repairs done locally or to contract for towage to get his ship home. In order to encourage the rescue of ships which are in danger, the law, without the necessity of any contract, provides for handsome remuneration for the salvors if they succeed, but for nothing if they do not; and this remuneration is based not only on the time, labour and risk involved, but also on the value of that which is saved; and it is charged on it.

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(1) The Shipping Gazette July 7, 1874.

(2) 1 Wm. Rob. 174.

(3) 1 Spinks 169.

(4) 3 Wm. Rob. 138.

Remuneration on such a scale cannot however, be justified when the shipowner has, as a practical matter, a freedom of choice either to accept the proffered services or to adopt some other alternative: for then he would normally in his own interest—and should in the interest of the cargo owners—throw the other alternatives into the scale so as to reduce the remuneration to a figure which represents the time, labour and risk involved to those who render the services. If the shipowner, having a choice before him, contracts to pay for the services on a salvage basis, that is his affair—it may be so important for him to fulfil his future engagements that he contracts on that basis—but he cannot by so doing make the cargo owner liable for salvage unless the services are really salvage services: *Anderson* v. *Ocean Steamship Co.* (1).

The correctness of these views can be seen by taking an illustration: suppose that a disabled ship has been towed into Suez where she is in safety and whence she can be towed by Canal tugs to Port Said, and that there is available at Port Said an ocean tug ready to tow her at towage rates from Port Said to Falmouth; but that the owner chooses instead to employ another of his own ships to tow her on a salvage basis. Are the cargo owners liable for salvage? The answer, I should have thought, is plainly that the cargo owners are not liable for salvage, but only for a general average contribution to what towage by the tug would have cost. Suppose, now, that the ocean tug is not immediately available at Port Said but will be available in about five to seven days' time, is the position any different? If the shipowner had no other ships of his own in the vicinity, he would no doubt have waited for the tug, and the cargo owner would only be liable for a general average contribution. Can the liability of the cargo owner be increased into a liability for salvage because the shipowner happens to have another of his own ships there? The answer, I should have thought, was that the cargo owners are only liable for salvage when the ship is in danger: and it is not open to a shipowner, when the ship is in safety, to tack on an additional liability to the cargo owner by towing with another of his own ships.

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(1) (1884) 10 App. Cas. 117.

Applying these principles, I think that there is much to be said for the view that the services rendered by the *Glenogle* were towage services, and not salvage. It seems to me that at Aden, or at any rate at Suez or Port Said, the ship was safe and the owners had a freedom of choice; and that, if the *Glenogle* had been under different management, the owners would not have accepted her services at an unknown price on a salvage basis, but would have insisted on a competitive price at towage rates, especially when they had a competitive offer from the tug *Empire John*. The cargo owners should not be prejudiced simply because the *Glenogle* was under the same management as the *Troilus* and accordingly no one troubled to ask for a quotation beforehand. It all depends, however, on what view one takes of the facts, and I would not venture to differ from the views which my brethren have found upon them. The appeal must, therefore, be dismissed.

Appeal dismissed.
Leave to appeal to the House of Lords

Solicitors for the cargo owners: *Thomas Cooper & Co., for Batesons & Co., Liverpool.*

Solicitors for the claimants: *Bentleys, Stokes and Lowless, for Alsop, Stevens & Collins Robinson, Liverpool.*

H. G.

WALL *v.* WALL.

1949
Nov. 3, 4, 9.
Pearce J.

Divorce—Jurisdiction—Petition for presumption of death and dissolution of marriage—Petitioner resident in England—No claim to English domicile—Competency of English court to hear petition—Matrimonial Causes Act, 1937 (1 *Edw.* 8 *and* 1 *Geo.* 6, *c.* 57), *s.* 8.

The court has jurisdiction to hear a petition for presumption of death and dissolution of marriage by a person resident in this country although the petitioner has not claimed an English domicile (*a*).

The primary and essential purpose of s. 8 of the Matrimonial Causes Act, 1937, is to enable the petitioner to have it declared that the other party to the marriage is presumed to be dead. The power to decree dissolution was added as a safeguard for cases where the presumption of death might prove to be incorrect.

SUMMONS adjourned into open court.

In her petition, wherein she prayed for a decree of presumption of death and dissolution of marriage (1) Florence Wall stated: " The petitioner . . . . verily believes that she is " domiciled in New South Wales, Australia. The respondent's " . . . . present whereabouts are unknown to the petitioner " and the petitioner verily believes that he is domiciled in " New South Wales." The petitioner further stated that she and her husband had ceased to cohabit in 1917 when he left for Australia in a troopship, and that she had not seen him since, nor heard from him except for one letter written shortly after his departure and headed " at sea."

The petition was rejected in limine by the divorce registry on the ground that it did not allege an English domicile and that therefore the court had no jurisdiction to entertain it. The petitioner issued a summons to have cause shown why she should not have leave to present her petition notwithstanding the fact that she appeared to be domiciled in New South Wales.

The court invited the King's Proctor to assist in argument.

R. J. A. Temple for the petitioner. It is conceded that

(*a*) Reporter's note: Since this decision was given it has been enacted by the Law Reform (Miscellaneous Provisions) Act, 1949 (12, 13 & 14 Geo. 6, c. 100), s. 1, sub-s. 3 (*b*), that in proceedings under s. 8, sub-s. 1, of the Matrimonial Causes Act, 1937, in cases where the petitioner is not domiciled in England, " the " court shall have jurisdiction " only . . . . (*b*) in proceedings " by the wife, if she is resident in " England and has been ordinarily " resident there for a period of " three years immediately " preceding the commencement " of the proceedings . . . ."

(1) Matrimonial Causes Act, 1937, s. 8, sub-s. 1: " Any " married person who alleges " that reasonable grounds exist " for supposing that the other " party to the marriage is dead " may present a petition to the " court to have it presumed that " the other party is dead and to " have the marriage dissolved, " and the court, if satisfied that " such reasonable grounds exist, " may make a decree of " presumption of death and " dissolution of marriage."

domicile is the test for jurisdiction in divorce a vinculo. There are, however, certain statutory exceptions. The requirement of domicile is not to be found in any statute, and *Forster* v. *Forster and Berridge* (1) contains cogent evidence that in 1863 the judges who were considering the Act of 1857 were prepared to deal with domicile as and when it arose. The position then was doubtful, and it is therefore not surprising that in 1878 a matrimonial residence was held to be enough: *Niboyet* v. *Niboyet* (2). It was not until 1895 that domicile took the place of residence, when the Judicial Committee of the Privy Council followed in *Le Mesurier* v. *Le Mesurier* (3) the dissenting judgment of Brett L.J. in *Niboyet* v. *Niboyet* (2). Indeed, it may be said that the matter was not finally concluded until 1927 in *Salvesen or von Lorang* v. *Administrator of Austrian Property* (4). There were cases before that decision in which the courts took jurisdiction: see *Ogden* v. *Ogden (otherwise Philip)* (5), *De Montaigu* v. *De Montaigu* (6), and *Stathatos* v. *Stathatos* (7). The doctrine that domicile is essential for jurisdiction may be said to be of recent growth. The matter cannot be disposed of merely by arguing that domicile must be the test because status may be affected. There are suits where the court makes decrees affecting status in which residence, and not domicile, suffices: for example, judicial separation, certain nullity suits, e.g. *White (otherwise Bennett)* v. *White* (8), *Easterbrook* v. *Easterbrook* (9), *Hutter* v. *Hutter (otherwise Perry)* (10), and possibly jactitation of marriage. [Counsel referred to the Matrimonial Causes Act, 1937, s. 13, and to the Matrimonial Causes (War Marriages) Act, 1944.]

Examination of the statute and a consideration of the circumstances for which the statute was the remedy should lead to the conclusion that the proceedings proposed in this case are not proceedings for divorce. If dissolution of marriage had been the prime object of the legislature, s. 13 would have been the appropriate place for the relief prayed; indeed, s. 8, sub-s. 3 ("Sub-sections 181 to 184 inclusive of the principal "Act shall apply to a petition and a decree under this section "as they shall apply to a petition for divorce and a decree

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(1) (1863) 3 Sw. & Tr. 151, 155.
(2) (1878) 4 P. D. 1.
(3) [1895] A. C. 517.
(4) [1927] A. C. 641.
(5) [1908] P. 46.
(6) [1913] P. 154.
(7) Ibid. 46.
(8) [1937] P. 111.
(9) [1944] P. 10.
(10) Ibid. 95.

"of divorce respectively"), contrasts a petition and a decree under s. 8 with a petition for divorce and a decree of divorce, ss. 181 to 184 being specifically applied. It follows that many other sections of the principal Act which are applicable to divorce do not apply—notably s. 178 (as substituted by s.4 of the Matrimonial Causes Act, 1937). The discretionary bars do not apply: see, for example, *Edwards* v. *Edwards* (1), where it was held that it was not necessary to include a prayer for the exercise of the court's discretion when petitioning under s. 8. The dissolution of marriage referred to in s. 8, sub-s. 1, is merely a dissolution consequential on a finding by the court that the other party to the marriage is dead, and is not a dissolution of an existing marriage between spouses both of whom are known to be alive. It is a declaratory section. Where a second marriage is contracted by a spouse whose husband or wife has been continually absent for seven years and has not been known by that spouse to be living within that time, there will not be a criminal conviction (2); but such a marriage would be bigamous if the absent spouse were in fact alive, and the children of that marriage would not be legitimate. The dissolution in s. 8, sub-s. 1 is purely precautionary.

From the statement in Wolff on Private International Law, at p. 281, it is to be inferred that proceedings under the section can be brought in this country by persons domiciled elsewhere. *Antanina Anskaitis or Labcianskas, Petitioner* (3) is distinguishable. The question of domicile there argued turned on a different point, and the phraseology of the relevant statute, the Divorce (Scotland) Act, 1938 (1 and 2 Geo. 6, c. 50), s. 5 (4), is very different.

Colin Duncan for the King's Proctor. A decree under s. 8 of the Matrimonial Causes Act, 1937, is a decree of dissolution altering the status of the parties. It is therefore a judgment in rem. In suits for dissolution of marriage the domicile of the parties is the test for jurisdiction. This was held to be the correct principle by the Privy Council in *Le Mesurier* v. *Le Mesurier* (1) approving Brett L.J.'s dissenting judgment in *Niboyet* v. *Niboyet* (2) and adopted by the House of Lords in *Salvesen or Von Lorang* v. *Administrator of Austrian Property* (3).

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(1) [1948] W. N. 146.

(2) See Offences Against the Person Act, 1861, s. 57.

(3) 1949 S. L. T. 199.

(4) The Divorce (Scotland) Act, 1938, s. 5, sub-s. 1: "Any "married person who alleges "that reasonable grounds exist "for supposing that the other "party to the marriage is dead may "present a petition to the court "craving a decree of dissolution "of the marriage on the ground "of the presumed death of the "other party, and the court, if "satisfied that such reasonable "grounds exist, may grant such "a decree."

(Sub-section 2, referring to the effect of seven years' absence, etc., is similar to s. 8, sub-s. 2, of the English Act of 1937.)

Power to grant a decree of divorce a vinculo matrimonii was given to the Divorce Court by the Matrimonial Causes Act, 1857. That Act provided that in matters which previously came within the jurisdiction of the ecclesiastical courts, e.g., nullity, decrees of divorce a mensa et thoro, the principles which guided the ecclesiastical courts should continue to be applied. The jurisdiction of the bishops in those courts was founded on the residence of the parties within the diocese, and it was exercised in suits for all types of matrimonial relief; but there was no power to grant a divorce a vinculo. The perpetuation of this jurisdiction explains why the Divorce Court has accepted jurisdiction in some suits for nullity and judicial separation (which alter status) even though the parties were not domiciled in England, see *Eustace* v. *Eustace* (4), *Easterbrook* v. *Easterbrook* (5) and *Hutter* v. *Hutter* (*otherwise Perry*) (6). The effect of *De Reneville* v. *De Reneville* (7) and *Casey* v. *Casey* (8) is to limit, and not to extend, this jurisdiction.

Sections similar to s. 8 have been considered by the courts of Scotland—in *Antanina Anskaitis or Labacianskas, Petitioner* (9)—and of Queensland, Australia—in *Cocks* v. *Cocks* (10); in both cases, either by inference or directly, domicile was held to be essential.

The dominant purpose of s. 8 must be dissolution of marriage. Declarations of presumption of death are obtainable in the Probate and Chancery Courts; and in any event the law presumes death after seven years unexplained absence: see *In re Phene's Trusts* (11), which was followed by Lord Merriman P. in *Chipchase* v. *Chipchase* (12).

If the missing spouse is in fact dead, the section serves no useful purpose. Every eventuality which may affect the petitioner is clearly provided for by the law except the reappearance of the absent spouse, which is provided for by s. 8 in dissolving the marriage. The decree under the section is therefore a judgment in rem and the court of the domicile is the proper tribunal.

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(1) [1895] A. C. 517.
(2) (1878) 4 P. D. 1.
(3) [1927] A. C. 641.
(4) [1924] P. 45.
(5) [1944] P. 10.
(6) Ibid. 95.
(7) [1948] P. 100.
(8) [1949] P. 420.
(9) 1949 Sc. L. T. 199.
(10) [1946] Q. S. R. 146.
(11) (1869) L. R. 5 Ch. 139.
(12) [1939] P. 391.

[*Inverclyde* (*otherwise Tripp*) v. *Inverclyde* (1), *In the Goods of Matthews* (2), *In the Goods of Hurlston* (3), *Haddock* v. *Haddock* (4), *Williams* v. *State of North Carolina* (5), the Matrimonial Causes Jurisdiction Act (Queensland), 1864 (as amended by s. 3 of the Matrimonial Causes Acts, Amendment Act, 1943), s. 39 (*a*), the Matrimonial Causes Jurisdiction Act (South Australia), 1929–1941, s. 6 (*a*), sub-s. 1, Dicey's Conflict of Laws (6th ed.), p. 23, Wolff's Private International Law, p. 281, para. 257, the American Restatement of the Law, Conflict of Laws (Jurisdiction for Divorce), paras. 110, 111 and 113, as amended in 1948, also referred to.]

Temple in reply.

Cur. adv. vult.

Nov. 9. PEARCE J. read the following judgment: I am greatly indebted to both counsel for the very clear and careful way in which they have put their respective contentions.

In 1917 the wife, who was a shop assistant married in England a private soldier in the Australian Forces. Three months later he left England by troopship. She stayed in England. Apart from a letter written on board ship she has neither seen nor heard of him since he left. She now wishes to petition under s. 8 of the Matrimonial Causes Act, 1937, to have it presumed that her husband is dead and to have the marriage dissolved. In her proposed petition she states her belief that the domicile of her husband and herself is in New South Wales. This belief rests, I understand, on the somewhat insecure foundation that her husband told her that his father (who was a cattle drover) was living at an address in New South Wales.

The petition was rejected in limine by the divorce registry on the ground that it did not allege an English domicile and that therefore the court had no jurisdiction to entertain it. Application is now made to me by the wife to allow it to be filed on the ground that an English domicile is not necessary to found jurisdiction.

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(1) [1931] P. 29.
(2) [1898] P. 17.
(3) Ibid. 27.
(4) (1906) 201 U. S. 562.
(5) (1942) 317 U. S. 287.

As the case is one of difficulty, I invited the King's Proctor to assist the court by arguing the matter. [His Lordship read s. 8, sub-s. 1, of the Matrimonial Causes Act, 1937, and continued :] In the ecclesiastical courts before 1857 jurisdiction depended on residence, not on domicile. By the Matrimonial Causes Act, 1857, all jurisdiction then exercisable by the ecclesiastical courts in respect of divorces a mensa et thoro, suits of nullity of marriage and other matrimonial matters was vested in the Divorce Court. Decrees of judicial separation having the same effect as divorces a mensa et thoro were substituted for them. The court was given a new power of decreeing dissolution of marriage. It was provided that in all proceedings other than those for dissolution of marriage the court should proceed on the principles and rules as nearly as may be conformable to those of the former ecclesiastical courts.

The Act of 1857 contained no express provision with regard to jurisdiction. The legal principles determining the jurisdiction of the newly constituted court were at first in doubt. In *Forster* v. *Forster and Berridge* (*Graham intervening*) (1), it is to be noted, the judge ordinary said: "I should "have been very glad indeed if the legislature had said that "the court had no jurisdiction except over persons domiciled "in England. When Lord Campbell was Lord Chancellor, "I asked him to bring in a bill to settle the question and to "define my jurisdiction; but he said, 'I cannot do it. When"'ever that question is raised, it must be decided upon legal "'principles. It cannot be defined.'"

In 1895 the Judicial Committee of the Privy Council in *Le Mesurier* v. *Le Mesurier and Others* (2), on appeal from Ceylon, reviewed the English and Scottish cases and came to the conclusion that according to international law the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage. The reasons for adopting domicile as the true test are clearly set out in a dissenting judgment of Brett L.J. in *Niboyet* v. *Niboyet* (3), a case which in the light of the later decisions must be considered to have been wrongly decided.

From 1895 onwards the courts have followed *Le Mesurier* v. *Le Mesurier* (2) and held that domicile is the true test in suits

(1) (1863) 3 Sw. & Tr. 151, 155.
(2) [1895] A. C. 517.
(3) (1878) 4 P. D. 1, 11–13.

for dissolution of marriage. In 1927 the House of Lords regarded it as established that for a decree of dissolution of a marriage the court of the domicile is the true court of jurisdiction, and that in principle that jurisdiction ought to be regarded as exclusive, since it affected the status of the parties and was equivalent to a judgment in rem: *Salvesen or Von Lorang* v. *Austrian Property Administrator*, per Lord Haldane (1).

Concurrently with the refusal of the court to entertain suits for dissolution of marriage where a foreign domicile is involved, there has been an acceptance by it of suits that do involve an alteration in status and are equivalent to judgments in rem. For instance, the court makes decrees of judicial separation where the parties are domiciled abroad. These involve alteration of status: per Atkin L.J. in *Eustace* v. *Eustace* (2). The court in certain cases makes decrees of nullity where the parties are domiciled abroad. These also involve alteration in status: per Lord Haldane and Lord Dunedin in *Salvesen or Von Lorang* v. *Administrator of Austrian Property* (3).

Mr. Temple relies on these instances as showing that the court has not in the past been, and should not be, rigidly prevented by the existence of a foreign domicile from making decrees in any cases involving alteration of status where it is necessary to do so to avoid hardship. Mr. Duncan says that these instances are justifiable on historical grounds and do not lessen the rigidity with which the court refuses to deal with cases of dissolution where there is a foreign domicile.

Mr. Temple also referred to *Stathatos* v. *Stathatos* (4), and *De Montaigu* v. *De Montaigu* (5), both of which adopted a dictum of Lord Gorell in the Court of Appeal in *Ogden* v. *Ogden* (*otherwise Philip*) (6) as showing that in a proper case the court will assume jurisdiction even in suits for dissolution. Those cases concerned a situation that had arisen because the court of the husband's domicile had declared marriages void on grounds not recognized in England. They assumed in the wife her original English domicile to support her petition for dissolution of the marriages that had been avoided in the courts of domicile. But, since those cases were decided before *Salvesen's* case, I do not think that they are of much assistance.

(1) [1927] A. C. 641, 654.
(2) [1924] P. 45, 54.
(3) [1927] A. C. 641, 654, 662.
(4) [1913] P. 46.
(5) Ibid. 154.
(6) [1908] P. 46, 82, 83.

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In *Hutter* v. *Hutter* (*otherwise Perry*) (1), where the marriage was in England but the domicile was foreign, the court assumed jurisdiction and gave a decree of nullity on the ground of wilful refusal to consummate the marriage, a ground that was first created by statute in 1937. The ground of the decision was the historical jurisdiction of the ecclesiastical courts in cases of nullity. This case was referred to in the Court of Appeal in *De Reneville* v. *De Reneville* (2) and in *Casey* v. *Casey* (3), and there was no unfavourable comment upon it. In the latter case, Somervell L.J. said of it (4): "No doubt there is force in the argument that nullity "suits where the marriage is voidable are similar to suits for "dissolution. On the other hand there seem to me to be "considerable reasons of convenience for giving the courts "of the country where the respondent or both parties reside "jurisdiction in this class of case, and I would desire, so far as "this court is concerned, to keep that point open until it "arises." *Casey* v. *Casey* (3) was a case of nullity where there was a foreign domicile, and Bucknill L.J. there said (5): "My opinion in favour of dismissing this appeal is based, "partly on the balance of hardship to the parties, but mainly "on the analogy of the rule that the court of the domicile "of the husband is the sole court with jurisdiction to dissolve "a valid marriage."

The effect of the cases (both now and in 1937 when the Act was passed) appears to me to be this:

1. Both in theory and practice our courts have accepted the principle that the court of domicile has sole jurisdiction in suits to dissolve an existing marriage, where there is a foreign domicile, and that our courts should not take jurisdiction in such suits. In such cases questions of hardship or convenience are irrelevant.

2. In suits for relief not involving dissolution of an existing marriage but involving alteration of status our courts have in theory accepted the principle that the court of domicile is the appropriate court to pronounce decrees that alter status and are equivalent to judgments in rem. How far they have accepted the principle that it is the only appropriate court does not appear certain: see per Lord Haldane (6) and per Lord Phillimore in *Salvesen's* case (7). See also

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(1) [1944] P. 95.
(2) [1948] P. 100.
(3) [1949] P. 420.
(4) Ibid. 433.
(5) Ibid. 431.
(6) [1927] A. C. 654.
(7) Ibid. 671.

Inverclyde (*otherwise Tripp*) v. *Inverclyde* (1); *de Reneville* v. *de Reneville* (2); and *Casey* v. *Casey* (3). But in practice they have taken jurisdiction, which theory might find it difficult to justify, in certain cases where the domicile is foreign and alteration of status is involved. They have done so where they have found historical (or, as in *Hutter* v. *Hutter* (4), quasi-historical) grounds for so doing. In such cases questions of convenience and hardship are not irrelevant.

3. In suits where no alteration of status is involved there is no objection to our courts accepting jurisdiction where there is a foreign domicile if the parties are resident in England.

If, therefore, the suit now under discussion is a suit for dissolution of marriage, the Act may be taken to have intended that this court should not take jurisdiction, and the question of hardship is irrelevant.

It becomes necessary to see what is the essential nature of the relief claimed under s. 8 of the Matrimonial Causes Act, 1937. Section 2 sets out the grounds on which divorce may be obtained (by substituting a fresh s. 176 in the Supreme Court of Judicature (Consolidation) Act, 1925). The list of grounds there set out does not include the relief under s. 8. Section 8, sub-s. 3, provides that ss. 181 to 184 inclusive of the Supreme Court of Judicature (Consolidation) Act, 1925 " shall apply " to a petition and a decree under this section as they apply " to a petition for divorce and decree of divorce respectively." It would seem therefore that the legislature is not regarding relief under s. 8 as being a decree of divorce. The sections of the Supreme Court of Judicature (Consolidation) Act, 1925, that are applied to such relief are those providing for interventions by the King's Proctor or other persons and the right of remarriage. Many sections concerned with maintenance, variation of settlements, custody, the duty of the court to inquire into questions of connivance or condonation, and the effect of misconduct by the petitioner (which would, of course, be unsuitable where there is a presumption of death) are clearly intended to be excluded (by the inclusion of the four specified sections) from applying to proceedings under s. 8. As the sections thus excluded by implication each contains such words of application as " on a petition for divorce " or " on a decree of divorce," it becomes clear that the legislature

(1) [1931] P. 29.
(2) [1948] P. 100.
(3) [1949] P. 420
(4) [1944] P. 95.

considered that proceedings under s. 8 would not attract the operation of sections that apply to divorce.

The reason for this is, I think, apparent in the section. Its primary and essential purpose is to enable a petitioner to have it declared that the other party to the marriage is presumed to be dead. It was intended, no doubt, that, where it was reasonable to presume death but impossible to prove it, widows or widowers should no longer have to sterilize their whole lives, but could marry again without being haunted by the probably unfounded fear that their spouses might reappear with disastrous results to their new families. It was *not* in my view intended that this should really be a fresh ground for divorce (masquerading as a presumption of death) where the vanished spouse is in fact alive. But, since facts sometimes belie presumptions, provision was made for the fact that occasionally spouses who were presumed dead, would in fact be still living. To provide no safeguard for a petitioner in such a case would stultify the whole object of the relief given. Professor Wolff in his Private International Law, at p. 281, discusses the methods of various legislatures for resolving the problem of the return of a spouse presumed to be dead (and it is interesting to note in passing that he assumes inferentially that under s. 8 the English courts *can* deal with cases involving a foreign domicile.)

As a safeguard, therefore, this Act has joined to the decree of presumption of death a decree of dissolution of the marriage, and has thereby produced a new, and in my view anomalous, form of relief. It is this safeguard that has led to the difficulty in this case. It is argued (I think rightly) that the relief under the section is not severable; and therefore it is argued that a petition to have it presumed that the other party is dead and have the marriage dissolved in fact constitutes a petition for dissolution of marriage.

It is fair to assume that in most cases where it is reasonable to presume death the decree of dissolution will not dissolve an existing marriage, since death will have already dissolved it. But, in the occasional cases where the person presumed dead is alive, the safeguard will take effect and an existing marriage will in fact have been dissolved by decree of the court. Does this occasional effect make a petition under s. 8 a petition for dissolution of marriage, or prevent the court from having jurisdiction where the domicile is foreign?

There is to my mind a fundamental difference between deliberately dissolving a marriage which the court knows to exist and dissolving (ex abundanti cautela) a marriage which the court presumes not to exist. Although there must always be some risk that the decree may alter status, owing to the party presumed dead being in fact alive, yet the risk in each case should not be a large one. In practice the alteration in status, if it occurred, would not be severe, since, where a husband's contact with his wife is so tenuous that his wife and the court presume him to be dead, it is unlikely that he or the community of his domicile are strongly conscious of his married status. Then must that risk deter the court from accepting jurisdiction ? I do not think that the legislature so intended.

The preamble to the Act sets out that it is expedient for (inter alia) the removal of hardship. If it had been intended that the removal of this particular hardship should not be available to Englishwomen who have married husbands domiciled elsewhere, it would have been easy to say so by enacting that the remedy shall be available not to " any " married person " but to " any married person domiciled " in England " (an almost identical provision in a South Australian statute of 1941 (1) gives the relief to " any married " person *domiciled in the State* "). There are many wives like the petitioner in this case, who are not very certain where their husband's domicile is and are not in a position to conduct experimental litigation abroad, and I think that it was the intention of the legislature that they should be able to participate in the benefits of the Act. It certainly seems just to such wives and also in the public interest that they should have their status as married women or widows established by this court if it properly can be done. To allow them to do so seems more in accord with the tenor of this Act of Parliament. Section 13, in order to alleviate the hardship in certain cases where the husband of a deserted wife has changed his domicile from England to some other country, gives jurisdiction for dissolution although this is a clear infringement of the principle that dissolution belongs only to the court of domicile. It seems unlikely that owing to the mere risk of such infringement the Act intended to withhold relief under s. 8 from a class whose hardship was obvious. I think it more likely that the legislature assumed and intended that owing to the anomalous nature of the relief under s. 8 our courts should not be deterred from taking jurisdiction under it when the husband had a foreign domicile.

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(1) The Matrimonial Causes Act Amendment Act, 1941 (No. 51) (Queensland), s. 4, amending s. 6 of the Matrimonial Causes Act, 1929-1938.

There have been two cases cited to me in respect of similar statutory provisions, one decided in Scotland, the other in Queensland. The Scottish case was decided at first instance against the petitioner on the ground that she had failed to prove a Scottish domicile. On appeal she succeeded because it was held that she had proved a Scottish domicile: *Antanina Anskaitis or Labcianskas, Petitioner* (1). In both courts it was assumed that a Scottish domicile had to be proved, and that point was never argued. But the Divorce (Scotland) Act, 1938, s. 5, is in different terms from the English s. 8. It does not give a right to apply to have it presumed that the other party is dead, with dissolution as a secondary safeguard, but only to apply for a "dissolution of the marriage on the ground of the "presumed death of the other party." This difference in terms and the absence of argument or comment on the point before me make it dangerous to give weight to that case in respect of the matter that I now have to decide.

The other case concerned a section of the Queensland Matrimonial Causes Jurisdiction Act of 1864 (2), introduced into the legislation (without preamble, and in company only with an amending section relating to dispensation with the service of writs) by a short amending Act in 1943: *Cocks* v. *Cocks* (3). That section is in terms identical for all practical purposes with the section that I am now considering. In that case it was held that the petitioner must at the date of the institution of proceedings be domiciled in Queensland. I have studied the judgments carefully, and the reasoning in them is bound to carry great weight with me. Macrossan C.J. was of opinion (4) that the terms of the section with which he was dealing "indicated clearly that the exercise of the powers conferred "on the court by the section is subject to the same require-"ments as to jurisdiction as the ordinary action for dissolution "of marriage," and found himself unable to accept the view that the jurisdiction conferred by the section was an anomalous jurisdiction and that therefore the court should exercise jurisdiction in favour of any person resident in Queensland.

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(1) 1949 S. L. T. 199.

(2) Section 39A of the Matrimonial Causes Acts, 1864 to 1945.

(3) [1946] Q. S. R. 145.

(4) Ibid. 145, 149.

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The section that I am considering was introduced into the legislation in a different way from that in Queensland, and though many of the considerations before me are the same as those before the Chief Justice, some are different. I have had some doubt in the matter and I regard the question as far from easy. But, for reasons which I have already indicated above, I find myself unable to take the same view of the section before me as he did of the section before him.

In my view relief under s. 8 is not primarily or in essence dissolution of marriage, and was not intended to be so. The dissolution was added as a safeguard. The risk that in certain cases the presumption may be incorrect so that the safeguard will then come into operation and effect an alteration of status in respect of a person domiciled abroad was not in my opinion intended by the legislature to deter this court from accepting jurisdiction and should not prevent its doing so.

I think therefore that residence is the test, not domicile. Since the husband is ex hypothesi presumed dead and as such has no residence, it cannot have been his residence that was intended to be the test. It is the residence of the petitioner that was intended to give jurisdiction.

I accordingly direct that the petition should be filed.

Solicitors: *Malcolm Slowe & Co.*
The Treasury Solicitor.

J. B. G.

Followed. BATER *v.* BATER. [1950] 2 All E.R. 458.

Considered. BATER *v.* BATER [1951] P. 35

DAVIS *v.* DAVIS.

C. A.
1949
Nov. 9

Bucknill, Somervell and Denning L.JJ

Divorce—Cruelty—Standard of proof—Corroboration.

There is no decision of the Court of Appeal that matrimonial offences, other than that of adultery, need be proved in the Divorce Court as strictly as a crime is proved in a criminal court.

Per Denning L.J. A suit for divorce is a civil and not a criminal proceeding. The stringency required to prove a crime in a criminal court is not necessarily called for in divorce suits, or, at any rate, in divorce suits on the ground of either cruelty or desertion, where the court is concerned, not to punish anyone, but to give statutory relief from a marriage which has irretrievably broken down. In a suit for divorce on the ground of cruelty the court should not require any higher standard than that required by the statute, that is, that it should be "satisfied, on the "evidence, that the case for the petition has been proved."

Churchman v. *Churchman* [1945] P. 44, and *Ginesi* v. *Ginesi* [1948] P. 179, considered.

APPEAL from Barnard J.

A husband petitioned for divorce on the ground of cruelty. The wife by her answer also claimed a decree on the ground of cruelty. Barnard J. dismissed both petition and cross-prayer. The husband appealed, but the wife did not appeal. The only question was whether the judge was right in dismissing the husband's petition, which he had found unproved.

In the course of his judgment Barnard J. said that a charge of cruelty must be proved with the same decree of strictness as a crime is proved in a criminal court, citing *Churchman* v. *Churchman* (1), where Lord Merriman P. in the Court of Appeal said (2): "The same strict proof is required "in the case of a matrimonial offence as is required in "connexion with criminal offences properly so called."

E. G. H. Beresford, for the husband, submitted that Barnard J. had misdirected himself.

Cuddon for the wife.

BUCKNILL L.J. [on this issue]. This seems to me to be rather a theoretical question, but it has caused a certain amount of discussion and, no doubt, may require to be settled hereafter. I do not propose to attempt to settle it today, but I wish to draw attention to two cases. In *Ginesi* v. *Ginesi* (3) the Court of Appeal accepted the statement of Lord Merriman P. in *Churchman* v. *Churchman* (1) that, at any rate so far as adultery was concerned, the same strict proof is required in the case of that particular matrimonial offence as is required in connexion with criminal offences properly so called. It is true that in *Churchman's* case (1) Lord Merriman P. used words with a broader connotation than that, because the words he used were "matrimonial offence." But in that case the court was merely dealing with the question of adultery. In *Ginesi* v. *Ginesi* (3), after quoting the dictum of Lord Merriman P. in *Churchman's* case (1), Wrottesley L.J. said (4): "It will be observed, therefore, that the standard of proof "with which we have been concerned in this case is there said "by Lord Merriman P., to apply to all matrimonial offences. "All that it has been necessary to establish in this case is that "that standard applies to the proof of adultery; and since "all the authorities cited to the court are cases of adultery,

(1) [1945] P. 44.
(2) Ibid. 51.
(3) [1948] P. 179.
(4) Ibid. 186.

" I only desire to say that, for myself, it seems to me that this " court today need only lay down that this standard of proof " applies to cases of adultery, leaving to other occasions the " decision whether it is equally applicable to other matrimonial " offences, in addition, of course, to connivance, the offence " which Lord Merriman P. must have had in mind in *Churchman* " v. *Churchman* " (1). It is of interest to note that in *Lauder* v. *Lauder* (2) Lord Merriman P. said, on the question of cruelty (3) : " It is a commonplace to say that cases of that " character need, as indeed do all cases of cruelty, to be " strictly proved, and strictly proved in accordance with the " well-known description of cruelty to which I will refer later."

I myself think that the word " strict " is quite sufficiently apt to indicate the measure and standard of proof in the case of cruelty, and that it is unnecessary to bring the question of criminal charges into consideration. I may perhaps point out as a matter of interest that the matter has been considered in the High Court of Australia in *Wright* v. *Wright* (4), in which that court declined to follow the decision in *Ginesi* v. *Ginesi* (5). The statute (s. 178 of the Supreme Court of Judicature (Consolidation) Act, 1925, as substituted by s. 4 of the Matrimonial Causes Act, 1937) requires that the court should be " satisfied, on the evidence, that the case for " the petition has been proved." I understand that to mean that, if there is any reasonable doubt at the end of the case, then the burden of proof has not been discharged and the decree ought not to be granted. If, on the other hand, the court is satisfied beyond all reasonable doubt, then the petitioner is entitled to a decree. I mention this, because it is possible that Barnard J. has set up a slightly too high standard of proof. [His Lordship then gave judgment on the facts.]

SOMERVELL L.J. delivered judgment on the facts.

DENNING L.J. : The judge directed himself in these words : " A charge of cruelty is a very serious charge " to make and this court has said over and over again that the " party who makes it must prove it beyond all reasonable " doubt ; it must be proved with the same degree of strictness

(1) [1945] P. 44.
(2) [1949] P. 277.
(3) Ibid. 283.
(4) [1948] 77 C. L. R. 191.
(5) [1948] P. 179.

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"as a crime is proved in a criminal court." If that has been said over and over again, it must have been in very recent times, because, so far as I am aware, it was not said previously. If it is correct, it marks an important departure; for there is a considerable difference between the standard of proof required in criminal cases and that required in civil cases—a difference which I endeavoured to define in *Miller* v. *Minister of Pensions* (1), to which I need add nothing now. In considering the standard of proof in divorce cases, it is important to remember that it has been held by the House of Lords in *Mordaunt* v. *Moncreiffe* (2), that a suit for divorce is a civil and not a criminal proceeding. One would expect therefore to find that, in the ordinary way, the rules of civil procedure would apply to divorce suits, and not the rules of criminal procedure. The standards and rules of the criminal courts have been built up out of the high regard which the law has for the liberty of the individual. No man's liberty is to be taken away unless the case is proved against him beyond reasonable doubt. The same stringency is not necessarily called for in divorce suits, or, at any rate, in divorce suits on the ground of cruelty or desertion, where the court is concerned, not to punish any one, but to give statutory relief from a marriage that has irretrievably broken down.

I should have thought that the statute itself lays down a sufficient test by requiring the court to be "satisfied on "the evidence that the case for the petition has been proved" (3). That puts the burden of proof on the person who makes the allegation, but it is not a burden of extraordinary weight. It is a burden which exactly accords with Lord Stowell's general rule in *Loveden* v. *Loveden* (4): "The only general "rule that can be laid down upon the subject is, that the "circumstances must be such as would lead the guarded "discretion of a reasonable and just man to the conclusion." That was the rule of the ecclesiastical courts, and it was cited with approval by Tucker L.J. in *Ginesi* v. *Ginesi* (5). The court in that case clearly did not intend to introduce any new rule. Whatever may be the position in adultery cases, it is clear that *Ginesi* v. *Ginesi* (5) gives no authority to the Divorce Courts to adopt for themselves in all divorce cases at one jump the standard of proof in criminal cases, to say nothing of the rules as to corroboration of accomplices and so forth which apply in criminal courts. There is, it seems to me, a danger in asserting, what the statute does not assert, that the charge must be proved beyond reasonable doubt, because of the temptation it affords to give effect to shadowy or fanciful doubts. That standard is a proper safeguard to persons accused in criminal cases; but, if applied in divorce cases, it may mean unjustly depriving an injured party of a remedy which he ought to have. In any case, *Ginesi* v. *Ginesi* (1) does not apply to cruelty cases; and I do not think that the court should require in them any higher standard than the statute itself requires, namely, that it should be "satisfied." It is clear from the judgment of Lord Merriman P. in the recent case of *Fairman* v. *Fairman* (2) that he has never required any higher standard in cruelty cases, and, strengthened by his authority, I say that no more should be required.

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(1) (1947) 63 T. L. R. 474.

(2) (1874) L. R. 2 Sc. & D, 374.

(3) See s. 178 of the Supreme Court of Judicature (Consolidation) Act, 1925, as substituted by s. 4 of the Matrimonial Causes Act, 1937.

(4) (1810) 2 Hag. Con. 1, 3.

(5) [1948] P. 179, 181.

The judge here seems to have required more; he required corroboration of acts of cruelty which were, I should have thought, proved clearly enough by the husband, and of which the wife's explanation is so incredible that it ought to be rejected. If corroboration were required of all acts of cruelty, it would mean that many petitioners would be unable to prove their cases, because it often happens that cruelty is not witnessed, but is done in the privacy of the matrimonial home. The injuries caused by the acts are often corroborated, but not the acts themselves. It seems to me, therefore, that the judge misdirected himself as to the standard of proof. I agree with what my brothers have said on the rest of the case, and that this appeal should be allowed.

Appeal allowed.
Decree nisi granted.

Solicitors: *Dennes & Co., for Harvey, Mabey and Walker, Birmingham; J. D. Daniell, Birmingham.*

(1) [1948] P. 179, 181. (2) [1949] P. 341, 344.

*In *Miller* v. *The Minister of Pensions*, Denning J. said of the degree of cogency required in a criminal case before an accused person is found guilty: "That degree is well settled. It need not reach certainty, but must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt.

The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence " of course it is possible, but not " in the least probably," the case is proved beyond reasonable doubt, " but nothing short of that will suffice."

And of the degree of cogency required to discharge a burden in a civil case, he said: " That degree is well settled. It must carry " a reasonable degree of probability, but not so high as is required in " a criminal case. If the evidence is such that the tribunal can say, " 'we think it more probable than not', the burden is discharged, but " if the probabilities are equal, it is not."

C. G. M.

1949
Nov. 10;
Dec. 2.
Ormerod J.

IN THE GOODS OF ITTER, DECD.

DEDMAN AND OTHERS *v.* GODFREY AND ANOTHER.

Probate—Will—Writing covered by slips of paper but decipherable by infra-red ray photography—Whether " apparent "—Wills Act, 1837 (7 *Wm.* 4 & 1 *Vict. c.* 26), *s.* 21.

Writing on a document is " apparent " within the meaning of s. 21 of the Wills Act, 1837, when it can be read by looking at the document itself, however elaborate may be the devices used to assist the eye, and however skilled the eye which is being used. Where it can only be read by the creation of a new document, for example, a special photograph, it is discoverable but not " apparent."

A testatrix pasted slips of paper over the amounts of certain legacies in a testamentary document, and on them she wrote certain sums of money. Although the new entries were signed by her, they were not attested as required by the Wills Act, 1837. Evidence was given that it was impossible to decipher the writing underneath the slips of paper otherwise than by taking infra-red-ray photographs.

Held, that, although the writing under the slips was discoverable by the method referred to, it was not " apparent " within the meaning of s. 21 of the Act of 1837.

Townley v. *Watson* (1844) 3 Curt. 761, applied.

Held, further, on the facts, that the doctrine of dependent relative revocation applied, and that the writing beneath the slips of paper, although " obliterated," should be admitted to probate.

PROBATE ACTION.

The plaintiffs were legatees under a codicil made in February, 1944, to a will made in November, 1942. On the codicil six

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slips of paper with writing and figures on them were pasted over writing and figures beneath appearing in clauses which originally purported to bequeath certain legacies to the plaintiffs and others. Expert evidence was given at the trial that the writing beneath the slips of paper could only be deciphered by means of photographs taken by infra-red rays, which photographs were produced at the trial. Although the testatrix had initialled the writing on the slips of paper, she had failed to have the alterations attested as required by the Wills Act, 1837.

The plaintiffs contended that the original writing was " apparent " within the meaning of s. 21 of the Act of 1837. They further alleged that the deceased had " affixed or caused " to be affixed the said slips of paper with the said writing " thereupon with the intention in each case of revoking the " said original respective amounts of the said legacies but " only in the event of the deceased having effectually substituted therefor the altered amounts written beneath " and/or upon the said slips."

Letters of administration, with the will and codicil annexed, had been granted to the defendants in March, 1947, and the slips of paper had been admitted to probate as blanks. The plaintiffs claimed that the letters of administration should be called in, revoked and declared null and void ; that the will and codicil should be proved in solemn form ; and that " letters " of administration with the said will and codicil but with the " inclusion of the original writing previous to any alteration " beneath the slips of paper . . . . be granted to the defendants " or to such other person or persons as to this Honourable " Court may seem fit." The defendants claimed that the deceased had revoked the legacies by her action and that the slips of paper had properly been admitted to probate as blanks.

There was no dispute at the trial as to the due execution of the will and original codicil. The questions were whether the original writing was " apparent " within the meaning of s. 21 of the Wills Act, 1837 (1), and, if not, whether the doctrine of dependent relative revocation applied.

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(1) Wills Act, 1837, s. 21 : " no obliteration, interlineation, " or other alteration made in " any will after the execution " thereof shall be valid or have " any effect, except so far as the " words or effect of the will before " such alteration shall not be " apparent, unless such alteration " shall be executed in like manner " as herein-before is required for " the execution of the will . . . ."

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IN THE GOODS OF ITTER, DECD.

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Middleton K.C. and *Sophian* for the plaintiffs.

Tyndale K.C. and *R. J. A. Temple* for the defendants.

Cur. adv. vult.

Dec. 2. ORMEROD J. [delivered a reserved judgment in which he stated the facts, and continued :] It is fair to say that it appeared to be the clear intention of the testator to bequeath to the respective legatees the amounts written on the slips of paper. But her signatures on these slips were not attested as required by the Act of 1837. Before the hearing an examination of the codicil had been made by a handwriting expert appointed for the purpose. He took photographs of the document by the use of infra-red rays and was able to produce to the court a photograph of the parts of the codicil which were under the slips of paper. I accepted his evidence of the original figures, and indeed there was no dispute between counsel on either side on this point. He said, however, that he was only able to find out what was under the slips by taking the photograph : he could not, by the assistance of any other modern scientific means in his possession or known to him, see what was on the codicil by looking at the document itself without removing the slips. It is contended by the plaintiffs that in these circumstances the words and figures under the slips are "apparent" within the meaning of s. 21 of the Wills Act, 1837. I cannot accept this contention. "Apparent" must mean, to quote the words of the judge in *Townley* v. *Watson* (1) which concern this point, apparent on the face of the "instrument "itself." If the words of the document can be read by looking at the document itself, then I think that they are apparent within the meaning of the section, however elaborate may be the devices used to assist the eye and however skilled the eye which is being used ; but if they can only be read by creating a new document, as in this case by producing a photograph of the original writing on the codicil, then I cannot find that the words are apparent. They may be discoverable ; in this case they have been proved to be so ; but that is not the word used in the section.

It is, however, argued on behalf of the plaintiffs that, even if the original words on the codicil are not apparent, they should nevertheless be admitted to probate since it was the clear intention of the testatrix to revoke only the parts of the codicil covered by the slips of paper in the event of her having

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(1) (1844) 3 Curt. 761, 768.

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effectively substituted other words to take their place. It is argued that if the slips were pasted on the codicil with the intention of revoking the legacies completely, and if it was only at a later date that the testatrix attempted to revive them in a modified form by writing on the slips, then, of course, there would still be a revocation ; but if, on the other hand, she pasted the slips over the amounts of the legacies with the intention of substituting other amounts, then the original legacies would still be in existence until there was an effective alteration of the codicil.

The only evidence available in this case is that of the document itself. It is to be noticed that on the first of the slips the top portion of the letter "P" is missing in such a way as to indicate that the letter was written before the slip was cut from the original piece of paper. On four of the slips the amount written in is the same as that under the slip in each case, although in three of these cases alterations had been made to the original before the slip was pasted on. What probably happened was, I think, that the testatrix decided to make some alterations to the amounts of the legacies, and, after making the alterations on some of them on the face of the document, pasted the slips over the amounts and wrote the final amounts on the slips. It may well be that she wrote the amounts on the slips before they were pasted on the document, as the shortened letter "P" on the first slip appears to show. I do not think that it is necessary, however, to to go so far. I consider that the inference should be drawn, from the fact that the amounts of the legacies only were obliterated in this way, and not the whole of the bequests, that it was the intention of the testator to revoke the part of the bequests covered by the slips only if new bequests were effectually substituted. This seems to me to be the only reason which the testator could have had for dealing with the codicil as she did. If this be so it follows that the slips may be taken off the document, if necessary, or any other means used to ascertain the writing which was on the document before the slips were pasted on. In those circumstances it follows that there must be judgment for the plaintiffs.

Judgment for the plaintiffs.

Mount, Sterry & Co. ; Kingsford, Dorman & Co., for Shepheards and Bingley, Kensington.

J. B. G.

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Nov. 18,
Dec. 15.

Willmer J.

CHAPELLE *v.* CHAPELLE.

Nullity of marriage—Validity of foreign decree—Husband domiciled in Malta—Wife domiciled before marriage in England—Marriage in England at register office—Marriage declared void ab initio by Maltese Court—Wife and her husband's domicile—Husband's domicile not sufficient.

The validity of a foreign decree of nullity, whereby a marriage is declared void ab initio, is accepted in this country if both parties were domiciled at the time of that decree within the foreign jurisdiction. The decree will not be recognized as binding and conclusive by the English court when the wife's acquisition of that foreign domicile depends solely upon the fact of the marriage which has been decreed a nullity. Such a decree would by its very terms destroy the ground upon which the claim to jurisdiction over the wife was based, namely, that of a common domicile, for whereas a wife is subject to the jurisdiction of the court of her husband's domicile as sharing a common domicile with him in the case of a marriage which is merely voidable, she does not necessarily do so if the marriage is void ab initio. The decree could only, therefore, be binding in such circumstances if the wife could be said to have acquired, and to have retained at the material time, a domicile of choice in her husband's country by virtue of her residence therein.

Salvesen or von Lorang v. *Administrator of Austrian Property* [1927] A. C. 641 and *De Reneville* v. *De Reneville* [1948] P. 100, applied.

A woman, admittedly domiciled in England, was married in 1931, at a register office in England, to a man domiciled in Malta. The parties, who were then living in Malta, came to England for the marriage because no civil decree of divorce is recognized by the law of Malta and the wife's previous husband, from whom she had been divorced, was still living at that time. After the ceremony the parties returned to Malta, where they lived together until 1941, when the husband was sent overseas on active service, and the wife returned to and thereafter remained in England. In 1943 the husband instituted proceedings for nullity of marriage in His Majesty's Civil Court in Malta, and in 1944 that court decreed the marriage in England to have been null and void ab initio on the ground that it had not been celebrated in accordance with the requirements of the canon law. The wife was represented by curators acting on her behalf, but she was not present, nor was she in Malta. She did not appeal. The husband subsequently came to England and acquired an English domicile of choice, and in 1949 he presented a petition for divorce on the grounds of his wife's adultery and desertion. On her application an issue was directed to be tried as to the legal effect of the Maltese decree of nullity on the validity and subsistence of the English marriage.

Held, (1.) that unless the wife could be said to have acquired a Maltese domicile otherwise than through her marriage, the court could not accept the decree of nullity as binding (requiring as it did a common domicile of the parties in order to have that effect) for the court would not permit the wife to claim at one and the same time the necessary common domicile with her husband in Malta by virtue of her marriage, and also rely on the decree of the Maltese Court annulling that marriage and destroying the foundation on which the claim to the necessary common domicile was based.

(2.) That the question whether the wife had retained, at the time when the nullity proceedings were begun, the domicile of choice in Malta, which she had previously acquired by virtue of her former residence there, must be determined at the trial of the suit for divorce, when all the material facts would be in evidence.

(3.) That if the wife should be held to have been domiciled in Malta at the material time, the decree of nullity, being in that case a decree of the court of common domicile, would be binding and conclusive.

[This case came before WILLMER, J., at the Liverpool Assizes and has been reported with the courteous assistance of counsel and solicitors engaged in the case.]

ISSUE tried by WILLMER, J., at Liverpool Assizes.

By a petition filed in the Liverpool district registry Joseph Victor Chapelle alleged that his wife, Kathleen Edwina Chapelle, was guilty of desertion and adultery, and he prayed for a decree of divorce. The wife entered an appearance under protest on the ground that the marriage had already been avoided by His Majesty's Civil Court in Malta. On her application and by order of the registrar an issue was ordered to be tried to determine " the legal effect of a decree or judicial " decision of His Majesty's Civil Court in Malta, dated August 7, " 1944, upon (*a*) the validity and (*b*) the subsistence of the " marriage between [the husband] and [the wife]." In that issue the wife was the plaintiff, the husband the defendant.

It was stated in the judgment of the Maltese Court (which was exhibited to an affidavit in the present proceedings) that Joseph Victor Chapelle had premised in the writ of summons that he was born in Malta and was domiciled there. The judgment further stated that " on November 3, 1931, during " the period of a brief and temporary stay in Lincoln, England, " he contracted marriage with [the wife]; that the marriage " was contracted before the registrar of marriages in the "district of Lincoln without observance of the formalities "prescribed by canon law for Catholic marriages; that at "the time the wife was married to, though divorced from, "R. B. who was still living; and that, consequently, so far "as [the husband] was concerned, [the wife's] previous marriage "was an impediment to his marriage to her." The husband had sought in Malta "a judicial declaration annulling his "marriage on the ground that, as a Catholic in Malta, he could "not have contracted a civil marriage, but should have been "married 'coram parocho et duobus testibus' according to "canon law, and on the ground that, at the time, the defendant "was under the diriment impediment of her previous "marriage."

The Maltese court held (1) that it could not recognize the validity of the marriage since it was not celebrated according

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(1) The Maltese judgment referred to the English views on the lex loci contractus and to a statement in Cheshire on Private International Law (2nd ed., p. 325), that in certain countries where status depended "on "religious laws as in . . . . "Malta . . . . a marriage con- "tracted in disregard of the "religious formalities of the "domicile, no matter where "solemnized, is not recognized "as valid," and continued: According to the Catholic concept of marriage, inter baptizatos nequit matrimonialis contractus validus consistere quin sit eo ipso sacramentum (Codex Juris Canonici, canon 1012, para. 2). As has been repeatedly affirmed by the Maltese Courts, all that which concerns the celebration of marriage, the marriage bond, and the subsistence of marriage is regulated in these islands solely and exclusively by the canon law. According to canon law, no marriage contract is valid which is not eo ipso sacramentum. Speaking of Catholics in general, and of persons of Maltese nationality in particular, the maxim "locus regit actum" holds good only in so far as the form of celebration adopted in the place of celebration creates between the spouses a marriage contract which is at one and the same time a sacrament, since individuitas contractus matrimonialis does not permit of the completion of the bond of marriage where the sacrament of matrimony is not comprised in the form of celebration.

In truth, the form of the celebration bears a decisive influence upon the essential quality of marriage. Therefore, so far as the plaintiff (i.e., the husband) was concerned, the form of marriage, to be valid and enduring, could not have been other than that established by the law of his own domicile—that is to say, that which conformed to canon law, which prescribes the religious ceremony. It is certainly perilous to society and public policy that the law which determines the status of the individual domiciles thereto the canon law; and in those circumstances it did not see "the necessity of going into the other question concerning "the nullity of the marriage by reason of the diriment impediment consequent upon the defendant's previous marriage— "a question which rather falls within the competence of the "Ecclesiastical Court."

It was indicated that the husband had presented his petition because of his doubts as to the validity in this country of the Maltese decree.

The further facts were stated by WILLMER, J., substantially as follows :—

The husband and the wife went through a ceremony of marriage on November 3, 1931, at the register office in Lincoln. At that time the husband, who professed the Roman Catholic faith, was domiciled in Malta, and he continued to be so domiciled until about the end of 1945, since when he had acquired an English domicile. The wife, who was a Protestant, was the divorced wife of one Bennet, from whom she was divorced in 1928. Until that time she had had an English domicile. It was alleged that during the next ten years she was resident in Malta, but it was not suggested that before the marriage ceremony in 1931 she had acquired a Maltese domicile.

No civil decree of divorce is recognized by the law of Malta, and if a person whose marriage has been dissolved by civil decree purports to re-marry during the lifetime of the previous spouse, the second marriage is deemed void in Maltese law. For this reason the parties, though both resident in Malta during 1931, came to England for the express purpose of being married in this country. Thereafter they returned to Malta, and cohabited in Malta as man and wife until 1941. The wife gave birth to two children, both born in November, 1933.

Early in 1941 the husband, who was then serving in His Majesty's Forces, was posted to India, and he did not return

under should be so easily evaded, with all the attendant consequences, through the simple expedient of a trip of a few days, or perhaps even of a few hours, thereby legalizing that which is absolutely prohibited by the law of domicile.

In these circumstances, therefore, the court cannot recognize the validity of the plaintiff's marriage with the defendant. . . . .

[The above passages are taken from a certified translation which was annexed to an affidavit of the wife.]

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to Malta until 1943. The wife left Malta in October, 1941, and returned to England. Thereafter she remained resident in England, and there was no further cohabitation between the parties. The husband by his petition alleged that the wife deserted him in October, 1941, and, further, that, since that date, she had committed adultery with a named correspondent. On those grounds he prayed for dissolution of the marriage.

In June, 1943, the husband had instituted proceedings for nullity in His Majesty's Civil Court in Malta. The wife was not herself present at the hearing, but her legal representatives were heard in opposition to the husband's claim. By a decree dated August 7, 1944, the court in Malta pronounced the purported marriage between the parties to have been null and void. The ground of the decision was that Maltese Law —the law of the husband's domicile—did not recognize as valid any form of marriage celebration which did not comply with the requirements of the canon law. It was held, therefore, that the purported marriage, not having been celebrated in accordance with the canon law, was defective in form and consequently could not be recognized as valid in Maltese law. The court treated the marriage not as voidable, but as void ab initio.

The wife did not appeal from the decree of the court in Malta, and, on being served with the present petition in England raised the question whether it was competent for the court in England to pronounce a decree of dissolution in respect of a marriage already annulled by decree of the competent court in Malta. Accordingly, in order to avoid the possible incurring of unnecessary costs in determining the merits of the husband's petition, an issue was directed as to the legal effect of the decree of His Majesty's Civil Court in Malta on the validity and subsistence of the purported marriage. The question was argued at Liverpool Assizes on November 18, 1949.

Glyn Burrell for the wife. Foreign courts have jurisdiction to pronounce a decree of nullity if the parties were domiciled in that country at the institution of the proceedings: Dicey, Conflict of Laws (6th ed.) r. 73, p. 381.

In ascertaining these parties' domicile, the law to be applied is that of English law. The marriage at Lincoln (unexceptionable by English law) conferred on the wife the Maltese domicile of her husband, and the Maltese court was right in assuming jurisdiction. That it then proceeded to apply the lex fori where an English court similarly placed would have applied the lex loci celebrationis or that of the party's ante-nuptial domicile is immaterial: this is not an appeal from the Maltese decision: the sole question here is whether the Maltese court was entitled to hear the case, not whether its conclusions accord with English law. As to the law which ought to have been applied, see *De Reneville* v. *De Reneville* (1).

Once jurisdiction is established, no erroneous choice of law thereafter in the Maltese proceedings can be held to have destroyed it. *Galene* v. *Galene* (2) is indistinguishable. In that case, as here, the tribunal of the country of domicile declared the marriage null and void, and not merely voidable. Henn Collins, J. accepted the foreign decree as being valid. So also *De Massa* v. *De Massa* (3). He relied upon the view of *Salvesen or von Lorang* v. *Administrator of Austrian Property* (4) and of *Roberts* v. *Brennan* (5) expressed by Bucknill, J., in *White* v. *White* (6).

Alternatively, the affidavit evidence establishes a domicile of choice by the wife, in Malta. The husband has not shown that by returning to England the wife reverted to her English domicile of choice.

A. E. Baucher for the husband. The tests which the Maltese decree must satisfy if it is to be immune from disturbance by the English court were laid down in *Salvesen or von Lorang* v. *Administrator of Austrian Property* (7). If the decree is to be immune, it must have been pronounced between persons subject to the foreign jurisdiction, it must relate to a matter which the Maltese court was competent to entertain, and it must not offend against the English view of substantial justice. The crucial test in the present case is whether the Maltese court had jurisdiction; and both parties must have been subject to its jurisdiction. That jurisdiction, it is submitted, might be provided either by residence or by domicile. The wife was clearly not resident in Malta at the time of the proceedings: was she, then, domiciled there? That must depend on whether the marriage which had been declared a nullity was by the law of Malta void or voidable.

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(1) [1948] P. 100.
(2) [1939] P. 237.
(3) The Times, March 31, 1931.
(4) [1927] A. C. 641.
(5) [1902] P. 143.
(6) [1937] P. 111, 123–4.
(7) [1927] A. C. 641, 663.

The vice in this marriage was such as to render it void by Maltese law. If it was void by the law of the intended conjugal domicile, then the domicile of the wife was a question of fact depending on her personal intentions and movements and not on the domicile of her husband: see by way of contrast, *De Reneville* v. *De Reneville* (1), where the marriage was presumed to be only voidable. If in this case the "wife" was a free agent, then she abandoned her domicile of choice in 1941 and reverted to an English domicile, which she has since kept.

It would therefore appear that the Maltese court had no jurisdiction over her in 1943, and that its decree was not effective to annul her English marriage.

Cur. adv. vult.

Manchester, Dec. 15. WILLMER J. read the following judgment, in which he stated the facts substantially as above set out, and continued: I am given to understand that the husband's main concern was merely to obtain a definitive ruling from this court, so as to safeguard his position, if only to the extent of his being protected from a possible charge of bigamy in the event of his being minded to contract a fresh marriage. The questions raised were of some difficulty and novelty, and having regard to this fact, as well as to the great importance of the matter from the point of view of the parties, I thought it right to take time to consider my judgment. The argument on behalf of the wife was based on the proposition thus stated in r. 73 (1) of Dicey's Conflict of Laws (6th ed.) at p. 381: "The courts of a foreign "country have jurisdiction to pronounce a decree of nullity "of marriage if—(1.) the parties were domiciled in such "foreign country at the commencement of the proceedings "for nullity." This rule is founded on the decision of the House of Lords in *Salvesen or von Lorang* v. *Administrator of Austrian Property* (2), in which it was held that, where the parties are domiciled in a foreign country, a decree of nullity of marriage pronounced by a competent court of that country will, in the absence of fraud or collusion, be recognized as binding and conclusive by the courts of England and Scotland, unless it offends against British notions of substantial justice. I was referred to *De Massa* v. *De Massa* (3) and *Galene* v. *Galene* (4), in both of which this court accepted as conclusive and binding French decrees of nullity pronounced in respect of marriages celebrated in this country between parties both of whom were domiciled in France. It was contended that the present case was indistinguishable, on the ground that the parties here were both domiciled in Malta, and consequently the Civil Court in Malta was a court of competent jurisdiction to pronounce a decree of nullity.

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(1) [1948] P. 100.
(2) [1927] A. C. 641.
(3) The Times, March 31, 1931.
(4) [1939] P. 237.

If I accepted the premiss, namely, that both parties were domiciled in Malta at the time when the Maltese proceedings were begun, I have no doubt that the conclusion contended for by the wife would follow, and I should be bound on the authorities to hold that the decree of nullity pronounced by the court in Malta is conclusive. There is no doubt that at the material time the husband was domiciled in Malta. The wife claims a Maltese domicile on two alternative grounds, (*a*) from the fact of her marriage to a husband domiciled in Malta ; or, alternatively, (*b*) from the fact of her residence in Malta for some ten years after the celebration of the marriage, with the intention of remaining there permanently. I will first consider the former claim, which to my mind raises a difficult question of law.

The argument of the wife is that her domicile at the material time must be determined by English law. The marriage celebrated between the parties in 1931 was celebrated in England and complied with all the requirements of English law. It is therefore contended that by English law the wife acquired the domicile of her husband. On behalf of the husband, however, it is objected that, the court in Malta having pronounced the marriage void ab initio, the wife can no longer rely on the fact of her marriage as giving her a Maltese domicile—in other words, the court in Malta, by its own act in pronouncing the decree of nullity, cut away the very ground on which its jurisdiction over the wife was based. *Salvesen or von Lorang* v. *Administrator of Austrian Property* (1) and the other cases to which I have referred were decided on the basis that the parties unquestionably shared a common domicile. In the present case, however, on the basis of the Maltese decree the wife did not acquire a common domicile with her husband from the mere fact of a marriage which, by the self-same decree, was held never to have been a valid marriage at all.

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(1) [1927] A. C. 641.

In the case of *White* v. *White* (1), it was clearly recognized by Bucknill, J., that the principle in *Salvesen* v. *Administrator of Austrian Property* (2) does not apply where there is no common domicile. On this point the decision in *White* v. *White* (1) was recently approved by the Court of Appeal in *De Reneville* v. *De Reneville* (3). Though the facts of the latter case bear little resemblance to those of the present, the reasoning of Lord Greene M.R. (4), wherein he stresses the distinction, in relation to domicile and proceedings for nullity, between marriages which are void ab initio and those which are merely voidable, is most helpful and instructive. A wife originally domiciled in this country, and seeking a decree of nullity here, against a husband domiciled abroad, must fail if her claim is based on the marriage being voidable : for in that event, until a decree is pronounced, the marriage remains valid, so that the wife will have acquired the husband's foreign domicile. Where, however, the claim is based on the marriage being void ab initio, such a wife may successfully proceed in this country, for the effect of the decree for which she asks will be to preserve her English domicile, since in the absence of any valid marriage she will never have acquired her husband's domicile. Conversely, it seems to follow that such a wife, suing abroad in the court of her husband's domicile, shares a common domicile with her husband in the case of a marriage which is merely voidable, but not if the marriage is void ab initio.

The view is expressed by Dicey in his Conflict of Laws (6th ed.) at p. 383, para. (*d*), that, where a husband domiciled abroad obtains in the court of his own domicile a decree of nullity in respect of a marriage void ab initio, this court will accept the foreign decree as binding only if it is itself satisfied that the marriage is void, in the sense that no decree of the court would have been required to avoid it. That, however, is hardly the case here : here we have a marriage which was undoubtedly celebrated in accordance with the requirements of English law, and the validity of which, but for the decree of the Maltese court, could not be questioned ; nor could there be any question but that, under English law, the wife, by her marriage, must be regarded as having acquired her husband's domicile in Malta. In such circumstances, is this court bound to accept as conclusive a decree of the Maltese court, annulling a marriage which would clearly be valid by English law, as against a wife who, unless for any other reason she acquired a Maltese domicile, must by the terms of the decree itself be regarded as still domiciled in England ?

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(1) [1937] P. 111.
(2) [1927] A. C. 641.
(3) [1948] P. 100, 113.
(4) Ibid. 111.

There is no authority, so far as I am aware, that is directly in point. The question is exhaustively discussed in Cheshire on Private International Law (3rd ed.) at p. 464, but no opinion is expressed as to what the correct answer may be. Indeed, the learned author leaves the question with the remark : "It is impossible to foresee what course the English court "will adopt when confronted with a problem of this nature." The nearest case which I have been able to find is *Ogden* v. *Ogden* (1). There a woman domiciled in England had married a domiciled Frenchman in circumstances which rendered the marriage voidable under French law. In due course the French court pronounced a decree of nullity at the suit of the French husband. The woman purported to contract a fresh marriage with another man in this country. In subsequent proceedings instituted by the second "husband" in this country it was held by the Court of Appeal that the French decree of nullity in respect of the first marriage was not binding in this country, with the result that in the eye of the law in this country the woman remained married to her original French husband. The actual decision of this case was clearly at variance with the decision in *Salvesen or von Lorang* v. *Administrator of Austrian Property* (2), and must be taken to be over-ruled by the House of Lords in the latter case. For in *Ogden's* case the marriage, being merely voidable, remained valid until avoided. Consequently the woman by her marriage acquired her first husband's French domicile, and therefore, in accordance with the principles stated in *Salvesen's* case (2), the decree of the French court, that being the court of the common domicile, ought to have been accepted as binding and conclusive in this country. But in delivering the judgment of the Court of Appeal, Sir Gorrell Barnes P., expressed the view (3) that if no valid marriage ever took place the woman could never have acquired a French domicile ; and it was apparently on that ground that the court (erroneously, as it proved) came to the conclusion that the French decree was not binding. The House of Lords in *Salvesen's* case (2) while disapproving the actual decision in *Ogden's* case (1), were

(1) [1908] P. 46.
(2) [1927] A. C. 641.
(3) [1908] P. 46, 78.

careful to express no dissent from the reasoning of Sir Gorell Barnes P., but distinguished the case on the ground that in *Salvesen's* case (1) there was no doubt as to the common domicile of the parties in Germany: see per Lord Haldane (2), per Lord Dunedin (3), and per Lord Phillimore (4).

In my judgment, if and so far as the wife's claim to have acquired a Maltese domicile depends on the fact of her marriage, I shall not be departing from the principle laid down in *Salvesen's* case (1), but rather following the reasoning of the members of the House of Lords in the passages to which I have referred, if I hold, as I do, that this court will not accept as binding the decree of the court in Malta which, by its very terms, destroys the one and only ground on which the claim to exercise jurisdiction over the wife could be based. I do not think that the wife can, at one and the same time, claim a common domicile with her husband in Malta, and yet rely on the decree of the Maltese court which destroys the foundation on which the claim is based.

This, however, does not dispose of the matter, for, as already pointed out, the wife claims that, quite apart from the effect of her marriage, she acquired a domicile of choice in Malta by her conduct in taking up residence with the husband in Malta with the intention of remaining there permanently. On the facts stated in the respective affidavits I can have no doubt that she did so acquire a domicile of choice in Malta. But the question remains whether she still retained her domicile of choice at the time when the proceedings in Malta were begun. If she did, then, notwithstanding what I have said as to the effect of the marriage, there would quite clearly, for other reasons, be a common domicile in Malta. In this event, I should clearly be bound, on the authority of *Salvesen's* case (1), to hold that the decree of the court in Malta, being a decree of the court of common domicile, was binding and conclusive.

I am, however, unable to come to any conclusion on this question, because the facts on which its determination must depend are not yet fully before the court. If the husband is right in his assertion that the wife deserted him and left Malta for good in the autumn of 1941, a fortiori if she did so with the intention of living in adultery with the co-respondent in England, I should have no difficulty in concluding that, long

(1) [1927] A. C. 641.
(2) Ibid. 660.
(3) Ibid. 662.
(4) Ibid. 669, 670.

before the beginning of the husband's proceedings in Malta, she had lost any right to assert a domicile of choice in Malta founded on her residence there. On this basis of facts, if the wife cannot rely on the marriage as conferring upon her a Maltese domicile, I do not see how she is any better off by alleging a Maltese domicile based on residence.

But the wife has not yet pleaded to the husband's petition, and I do not know what her version of the material facts may be. In the circumstances, it is impossible for me to reach any final determination of this question on the material at present before me. Certainly I cannot reach a decision which would have the effect of halting the husband's petition in limine. The question whether the wife still retained her domicile of choice in Malta at the time when the Maltese proceedings were begun can only be determined on the trial of the suit, when all the material facts have been proved in evidence. In the circumstances I think that this point must be kept open by leaving the wife free, if so advised, to allege in her answer that, at the time when the husband began his proceedings in Malta, she still retained a Maltese domicile by reason of her continued intention to reside in Malta. If she succeeds in establishing such a state of facts it will still be open to her to contend at the trial that the decree of nullity pronounced by the court in Malta ought to be accepted by this court as binding and conclusive. For the reasons already given, however, in so far as the determination of this issue depends on the wife's acquisition of a Maltese domicile by reason of the marriage, my judgment must be in favour of the husband and against the wife. I cannot say, on the material at present before me, that the decree of the civil court in Malta is conclusive to show that the marriage now sought to be dissolved is non-existent.

Judgment for the husband
(defendant in the issue).

Solicitors: *Silverman & Livermore, Liverpool, for E. E. Pugh & Co., London*; *Edwin Berry & Co.*

J. B. G.

1949
Dec. 14.

Pilcher J.

JACOBS *v.* JACOBS AND CEEN
CEEN *v.* JACOBS

Divorce—Damages—Jurisdiction—Petition limited to damages only—Petitioner domiciled and resident abroad—Marriage already dissolved on ground of respondent's adultery with co-respondent—Matrimonial Causes Act, 1857 (20 *&* 21 *Vict. c.* 85), *s.* 33—*Supreme Court of Judicature* (*Consolidation*) *Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 189.

Where a husband has obtained a decree of divorce on the ground of his wife's adultery, it is not necessary for him, in order to be entitled to maintain a claim for damages simpliciter against the alleged adulterer, to prove that he himself is domiciled in this country; nor, where he has obtained a decree of judicial separation, need he prove that he is resident in this country. To make such a claim the husband need be no better qualified as to domicile or residence than any other plaintiff in this country in an action for tort.

Where, therefore, a husband resident and domiciled in South Africa had obtained judgment in South Africa for the dissolution of his marriage on the ground of his wife's adultery committed with the co-respondent in England,

Held, that the husband was not prevented by the fact of his residence and domicile in South Africa from petitioning in this country under s. 189 of the Supreme Court of Judicature (Consolidation) Act, 1925, for damages against that co-respondent.

ISSUE as to jurisdiction.

The defendant in the issue, Israel Jacobs, filed in the divorce registry in April, 1949, a petition under s. 189 of the Supreme Court of Judicature (Consolidation) Act, 1925 (1), claiming damages against Louis Lionel Ceen, the plaintiff in the issue, on the ground that from August, 1948, to the date of the petition, the plaintiff had lived and cohabited and habitually committed adultery with the defendant's wife. By the petition the defendant sought no relief except damages and the costs of the suit and he averred that he and his wife (the marriage then being still in existence) were domiciled in Cape Province, South Africa, and that he was resident in Cape Town. The adultery was alleged to have taken place in London, where the wife and plaintiff were living.

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(1) The Supreme Court of Judicature (Consolidation) Act, 1925, s. 189, sub-s. 1. "A husband "may on a petition for divorce "or for judicial separation or for "damages only, claim damages "from any person on the ground "of adultery with the wife of the "petitioner.

Sub-section 2. "A claim for "damages on the ground of "adultery shall, subject to the "provisions of any enactment "relating to trial by jury in "the court, be tried on the "same principles and in the "same manner as actions for "criminal conversation were tried "immediately before the commencement of the Matrimonial "Causes Act, 1857, and the "provisions of this Act with "reference to the hearing and "decision of the petitions shall "so far as may be necessary "apply to the hearing and decision "of petitions on which damages "are claimed.

Sub-section 3. "The court may "direct in what manner the "damages recovered on any such "petition are to be paid or "applied . . . ."

The plaintiff entered an appearance under protest to the petition, and on June 13, 1949, it was ordered that an issue should be tried as to jurisdiction, the plaintiff having denied and the defendant having asserted that the High Court in this country had jurisdiction to hear the petition.

The defendant had on his side also instituted proceedings for divorce in the court of his domicile, and on June 9, 1949, Steyn J. (of the Supreme Court of South Africa) granted him "judgment for dissolution of the said marriage." The plaintiff and the wife were married before the hearing of this issue.

The defendant did not claim damages from the plaintiff in the South African proceedings, for it was the view of South African counsel (whose opinion was referred to during the hearing of this issue) that Mr. Jacobs would be unable to obtain damages against Mr. Ceen in those (South African) proceedings: see *Booth* v. *Booth* (1), where it was held that the Cape Province Court had no jurisdiction in respect of a tort committed beyond the territorial limits of its jurisdiction by a defendant who was not domiciled within the Cape Province. That was a suit for divorce on the ground of adultery against the first defendant and for damages against the second defendant.

Harold Marnham for the plaintiff: This court has no jurisdiction to hear this petition by a man who is domiciled in South Africa: *Phillips* v. *Batho* (2); *Harris* v. *Taylor* (3); and see the observations of Scrutton J. in the first-mentioned case (4). See also Halsbury's Laws of England, 2nd ed., vol. 10, para. 985, note (n), p. 668: "A petition for damages "alone will not lie unless there is jurisdiction to hear a "husband's suit by the test of domicile in divorce and residence "in judicial separation suits (*Harris* v. *Taylor* (3)) . . . ."

(1) (1920) C. P. D. (S.A.) 633.
(2) [1913] 3 K. B. 25.
(3) (1914) 111 L. T. 564.
(4) [1913] 3 K. B. 31, 32, 33.

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Although *Bell* v. *Bell and Cooke* (1) would appear to be against this contention, the report is very brief and is not, it is submitted, conclusive. Indeed, if the co-respondent in that case submitted to the jurisdiction, the case is not applicable, for here there has been a protest.

[PILCHER, J.: No amount of submission will give the court jurisdiction.]

The two matters of dissolution and damages are so inextricably interwoven and dependent on each other that the jurisdiction must be that of the divorce court. They must stand or fall together. [He also referred to *Cox* v. *Cox and Warde* (2), *Bernstein* v. *Bernstein* (3) and *Stocker* v. *Stocker* (4).]

Donaldson Loudoun for the defendant. Before 1857, any husband could sue in the courts of common law for damages in an action for criminal conversation. That action was in trespass—a tort; and the jurisdiction in such cases was entirely independent of domicile. The action for criminal conversation was abolished by s. 59 of the Matrimonial Causes Act, 1857. Section 33 of that Act gave a husband the right to present his case in damages to the divorce court: the important words for my present purpose in that section are: ". . . . the claim made by every such petition shall be heard " and tried on the same principles, in the same manner, and " subject to the same or the like rules and regulations, as " actions for criminal conversation . . . ."—that is, the same principles as for common law cases. Section 22 of the Act of 1857, whereby the court was, in proceedings other than those for the dissolution of a marriage, to act on the principles of the ecclesiastical courts, as nearly as may be, only applies to cases where the ecclesiastical courts gave relief; it does not apply to this case, as those courts never gave relief in damages.

[PILCHER J.: Did the plaintiff fail in an action of criminal conversation if it was proved he had connived at the adultery?]

Not automatically. It went to mitigation. The position was altered by s. 30: see *Bernstein* v. *Bernstein* (3). A claim for damages is not necessarily ancillary to divorce proceedings, and the assertion in *Phillips* v. *Batho* (5) is too wide: see for example, *Kent* v. *Atkinson* (6), recently approved by the

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(1) The Times June 10, 1932.
(2) [1906] P. 267.
(3) [1893] P. 292.
(4) [1917] P. 264.
(5) [1913] 3 K. B. 25, 32.
(6) [1923] P. 142.

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Court of Appeal in *O'Neill* v. *O'Neill and Piggott* (1). The adverse observations of Scrutton J. in *Phillips* v. *Batho* (2) were, it is submitted, only concerned with a case where damages were a part of a divorce petition.

Bell v. *Bell and Cooke* (3) is a firm authority in my favour here. [Dicey's Conflict of Laws, 6th ed., at p. 229, r. 31, referred to.]

The residence, as apart from the domicile of the petitioner, is immaterial.

Harold Marnham, in reply, referred to *Rayment* v. *Rayment* (4).

PILCHER J. [after stating the facts :] Stated in the simplest possible terms the issue is this. It is contended on behalf of the plaintiff that this court has no jurisdiction to entertain a claim for damages simpliciter against an alleged adulterer in this country unless the petitioner is domiciled here. On the other hand the defendant contends that, while domicile is a necessary prerequisite for every petitioner in this court who seeks the dissolution of his marriage, and residence in this country is a prerequisite for any petitioner who seeks a judicial separation, a claim for damages against an alleged adulterer is a claim in tort which is not necessarily ancillary to a claim for any other kind of relief ; and consequently, provided that the tort was committed in this country or the alleged tortfeasor is in this country, then this court has jurisdiction to entertain the claim whether or not the petitioner is domiciled or resident here.

The most material statutory provisions are s. 33 of the Matrimonial Causes Act, 1857 and s. 189 of the Supreme Court of Judicature (Consolidation) Act, 1925. By s. 33 of the Act of 1857 : " Any husband may either in a petition for " dissolution of marriage or for judicial separation or in a " petition limited to such object only, claim damages from " any person on the ground of his having committed adultery " with the wife of such petitioner . . . ." It is argued for the plaintiff that the words " any husband," with which that section begins, mean any husband who is either domiciled in this country (in the case of a petition for dissolution of marriage) or resident in this country (in the case of a petition for judicial separation), and that where a claim is made neither for dissolution nor for judicial separation but only for damages it is consequently necessary to construe the words " any " husband " as meaning any husband who is domiciled in this country where, as in this case, the suit was for divorce. Mr. Marnham contends that the husband in this case is admittedly not domiciled in this country, that these proceedings are consequently misconceived, and that the court has no jurisdiction to entertain them. That submission does not really appeal to me, even apart from authority. The words " any husband " in the section or " a husband " in the corresponding section, s. 189, of the Act of 1925, mean in my opinion what they say, that is, any husband who can properly bring a suit for dissolution or a suit for judicial separation or a claim for damages if he only claims damages. It is impossible to say that the words " any husband " mean any husband domiciled in this country. In my view those words, which are the material words, must mean, in a suit for dissolution, any husband who is domiciled in this country, or in a suit for judicial separation, any husband who is resident in this country; and, where the only claim is one for damages they must mean " any husband " who is entitled to maintain an action for damages in this country.

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(1) [1949] W. N. 394 ; 65 T.L. R. 624.

(2) [1913] 3 K. B. 25.

(3) The Times June 10, 1932.

(4) [1910] P. 271.

To turn to the authorities, the first in point of time is *Rayment* v. *Rayment* (1), a claim for damages against a co-respondent. The headnote states: " Whatever it is that " determines the jurisdiction of this court with regard to " co-respondents, that jurisdiction does not depend upon the " domicile of the co-respondent, nor is it to be determined by " the question whether the co-respondent is or is not a British " subject. So far as a co-respondent is concerned, the citation " corresponds with what would have been, before the Matri- " monial Causes Act, 1857, came into operation, the writ in an " action for criminal conversation . . . . The claim against " a co-respondent in a divorce suit is merely a personal claim " for money, and is not complicated with questions of inter- " national law arising out of status, as in the case of a petitioner " and respondent . . . . " I draw attention merely to this passage in the judgment of Sir Samuel Evans, P. summarizing the effect of certain sections of the Act of 1857 (2): " Any " husband may claim damages against 'any person' on the " ground of his adultery with his wife, either in a petition " for dissolution of the marriage, or in a petition limited to the

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(1) [1910] P. 271.

(2) Ibid. 286.

"claim for damages only, the damages in all cases to be ascertained by the verdict of a jury (s. 33); and the adulterer "if found guilty as co-respondent may, whether damages are "claimed or not, be ordered by the court to pay the costs "(s. 34). This remedy was given to an injured spouse in "place of the remedy by action for criminal conversation, "which ceased to exist in England after the Act came into "operation (s. 59). When the claim is made against a co-"respondent, or against the adulterer when not made a "co-respondent, 'it shall be heard and tried on the same "'principles, in the same manner, and subject to the same, "'or the like rules and regulations' as actions for criminal "conversation at common law (s. 33). The action of criminal "conversation was, of course, an ordinary action for tort, and "if it had not been taken away by the Act the courts here "would have inherent jurisdiction over the defendant, "altogether irrespective of his domicile, nationality, or "residence, if he was in England at the time of the service of "the writ, wherever the tort may have been committed, "assuming it was an unjustifiable act in the country where the "tort complained of was committed." The President is there saying, and saying only, that the action for criminal conversation was an ordinary action for tort and that under s. 33 a claim for damages against a co-respondent can be pursued irrespective of the latter's nationality, domicile or residence.

Next came *Phillips and Batho* (1), where Scrutton, J., made in the course of his judgment an observation which at first sight appears to indicate the view that a claim for damages against a co-respondent was necessarily allied with, and accessory to, a claim for dissolution or judicial separation. In that case the husband had obtained a decree in the Indian courts against his wife and had been awarded 7,200*l.* damages against a co-respondent. The co-respondent was not in India, and in due course the plaintiff husband presented his claim in this country for the 7,200*l.* and sought to enforce over here the award of damages made in his favour by the Bengal High Court. The point which I have to determine was not, of course, in issue before Scrutton J., but he said (2): "Ancillary and accessory to the judgment as to "status is the power to give damages against the person causing "the marriage to be dissolved. This power is recognized both "by the English courts and the Indian courts. The English

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(1) [1913] 3 K. B. 25. (2) Ibid. 32.

"courts will recognize and enforce the judgments as to status "of the Indian courts in matters within their jurisdiction, "and I think they will also recognize and enforce the ancillary "orders as to damages, such as they themselves make in "similar cases."

Mr. Marnham has relied on the first words of the passage which I have quoted, and I think it fair to say that Scrutton J. does seem to have regarded a claim for damages in a divorce suit as being necessarily ancillary and accessory to a claim for some other form of relief. In the case before me the relief obtained was dissolution, which of course involved status; but it is quite clear from the terms of s. 33 of the Act of 1857 and s. 189 of that of 1925 that a claim for damages only is not necessarily ancillary or accessory to any claim for any other form of relief.

Harris v. *Taylor* (1), was a decision of Bray, J., on rather complicated facts to which I need not refer. Scrutton, J.'s judgment in *Phillips* v. *Batho* (2) was cited (3), and I think that Bray, J., also took much the same view as did Scrutton, J., with regard to a claim for damages being accessory or ancillary to a claim for some other form of relief; but in neither case was there anything said on that point which was necessary for a decision of the case.

The last case that I need mention is *Kent* v. *Atkinson* (4). That case, (if it were necessary to do so), made it clear that a petition for damages is quite independent of and not necessarily ancillary to a petition for divorce. There the wife died during the course of the suit, and it was held that her death did not prevent the husband from filing a petition for damages provided that there was no other overriding provision in the Act to prevent him from doing so. In the result the court held that a petition for damages might be presented after the death of the wife.

Hill, J., in the course of his judgment, discussed s. 33 of the Matrimonial Causes Act, 1857, and pointed out that that Act abolished the old action of criminal conversation and remodelled the law applicable to claims for damages for adultery, making them cognizable by the Divorce Court. "As I understand the "decisions" he said (5), "the effect is this. You have to "read into the section the principles of the common law as "to actions for criminal conversation, and then strike out so

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(1) 111 L. T. 564.

(2) [1913] 3 K. B. 25.

(3) 111 L. T. 568.

(4) [1923] P. 142.

(5) Ibid. 146.

" much of them as are inconsistent with the provisions of the " Divorce Acts which are to be regarded as overriding provi" sions. Thus no claim for damages can be maintained if the " adultery has been condoned, for s. 30 overrides the common " law principle : *Bernstein* v. *Bernstein* (1) ; nor can it be " maintained if the adultery is one to which a discretionary " bar applies, and the discretion is not exercised in favour of " the petitioner : *Cox* v. *Cox and Warde*, (2), for s. 31 overrides " any inconsistent common law principle. The issue in the " present case therefore depends on two questions : (1.) accord" ing to the principles of the common law could an action for " criminal conversation have been maintained by writ issued " after the death of the wife ? (2.) if it could, are there over" riding provisions of the Divorce Acts which say that it cannot " be maintained ? As to (1.), the action was for a wrong done, " and the cause of action arose when the wrong was done. It " was a personal action, such as died with the person ; but the " persons concerned were the wronged husband and the wrong" doer, the adulterer. The wife was only the means whereby " the wrong was done. . . . . "

The conclusion reached by Hill, J., was that the death of the wife did not affect the husband's right to claim damages against the co-respondent.

Apart, therefore, from the two cases, *Phillips* v. *Batho* (3) and *Harris* v. *Taylor* (4) containing observations which are obiter, there is no authority in favour of the proposition that it is necessary for a husband who is entitled to maintain a claim for damages only against an adulterer to be better qualified as to domicile or residence in order to make that claim than any other plaintiff in this country in an action for tort. Indeed there is one decision—only reported in " The Times " Newspaper—*Bell* v. *Bell and Cooke* (5)—in which Lord Merrivale, P., granted to a petitioner with a Scottish domicile an award of damages against a co-respondent. The petitioner had obtained a decree nisi on the ground of his wife's adultery in Scotland ; he claimed damages against the co-respondent, an Englishman domiciled in England. The co-respondent in the Scottish suit pleaded that the Scottish court had no jurisdiction to entertain a claim for damages against any person not domiciled in Scotland, and the Scottish

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(1) [1893] P. 292.
(2) [1906] P. 267.
(3) [1913] 3 K. B. 25.
(4) 111 L. T. 564.
(5) The Times, June 10, 1932.

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court dismissed the claim for damages for lack of jurisdiction. The husband accordingly brought his claim in this country. It was tried before Lord Merrivale, P., and a jury, and while the report is brief (the arguments are not referred to) the President is not reported in his summing up to have made any observation at all which might tend to show that it was not competent to a petitioner admittedly domiciled abroad to bring in this country a claim of this nature.

Taking the view that I do of the ordinary meaning of the opening words of s. 33 of the Act of 1857 and s. 189 of the Act of 1925, my conclusion is this: Where a husband is merely making a claim for damages and where that claim is to be decided in this court on the same principles and according to the same rules and regulations as applied to a claim for criminal conversation when brought before the appropriate court before 1857, it is quite wrong to say that the words of s. 189 require this court to hold that in order to be entitled to maintain a claim for damages simplicitor a husband who has obtained a divorce must prove that he is domiciled in this country or in a case where he has obtained a judicial separation must prove that he is resident in this country. That being so I decide this issue in favour of the defendant.

Judgment for the defendant.

Solicitors: *Moreton, Phillips & Sons*; *Crossman, Block & Co. for Schaffer & Schaeffer, Cape Town, South Africa.*

J. B .G.

1949
Dec. 2.

Ormerod J.

Considered. MOLE *v.* MOLE [1951] P. 21

ot followed. POOL
. POOL
[1951] P. 470

BOSTOCK *v.* BOSTOCK

Husband and wife—Divorce—Evidence—Privilege—Interview between spouses and their respective solicitors.

Although a meeting between the parties to a matrimonial dispute in the presence of a probation officer must be taken to be without prejudice when that meeting has been arranged for the purpose of attempting to effect a reconciliation, an interview between the parties and their respective solicitors with a similar purpose in view is not to be taken to be without prejudice if it is not specifically stated so to be; and evidence of what occurred at such a meeting may accordingly be given notwithstanding objection by one of the parties.

McTaggart v. *McTaggart* [1949] P. 94, distinguished.

Petition for divorce.

In November, 1945, shortly after the petitioner and his wife had separated, a meeting took place between them and their respective solicitors with a view to a possible reconciliation, which did not, however, take place. During the hearing of this suit, wherein both parties alleged desertion, the husband sought to give evidence of what had taken place at that meeting. The respondent by her counsel objected on the ground that it was privileged. After hearing argument, Ormerod J. allowed the evidence to be given. His judgment is reported solely on that point.

William Latey for the husband.
R. Ormrod for the wife.

Ormerod J. [referred to the events preceding the meeting and continued :] Certain negotiations resulted, at the end of November, 1945, in a meeting between the husband and the wife and their respective solicitors. Mr. Latey tendered evidence of the events which took place at that meeting, but Mr. Ormrod, on behalf of the wife, objected to that evidence being called, on the ground that those events were privileged, and cited *McTaggart* v. *McTaggart* (1) in support of his contention. There a husband and wife, who had been separated, arranged to see the probation officer with a view to becoming reconciled. The attempt was not successful, and eventually there were proceedings at which evidence was given by the probation officer. The evidence was given to corroborate that of one of the spouses, for they could not agree as to what had taken place. The Court of Appeal held that, in the particular circumstances of that case, the facts to which the probation officer could speak were not privileged, and that he could give evidence ; but it was pointed out that the reason why he could give evidence there was that the privilege did not attach to him personally but to the two spouses. Since they had given evidence themselves as to what had happened at that particular interview, they had clearly waived their privilege. The probation officer could therefore be called to give evidence in support of the statements of one or other or both of them, as the case might be. Cohen and Denning L.JJ., however, in the course of their judgments, pointed out that, had the

(1) [1949] P.94.

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privilege not been waived, it would quite clearly have been effective because, as they put it, from the circumstances it was clear that a meeting arranged with the probation officer for the purposes of reconciliation was one which must be presumed to be without prejudice.

Mr. Ormrod asked me to say, on the strength of that authority, that this particular interview between the two parties and their respective solicitors was also an interview without prejudice and therefore privileged, as it was clearly arranged for the specific purpose of effecting a reconciliation. I do not think that the Lords Justices in *McTaggart* v. *McTaggart* (1) ever intended to go so far as to say that because the parties arrange a meeting in a matrimonial dispute for the purpose of discussing a possible reconciliation, it must be taken to be without prejudice if it is not specifically stated so to be.

It may be that in *McTaggart* v. *McTaggart* (1) the meeting was without prejudice; but in my opinion the Lords Justices were saying that the circumstances of that particular meeting, which was not only a meeting for the purpose of arranging a reconciliation but took place with a probation officer for that purpose, must be taken to be without prejudice because that very combination of circumstances was such as to compel the inference. Otherwise, if the parties discussed their affairs with the probation officer, knowing that evidence could afterwards be given of the conversations in court, they would be much less likely to be frank with him, and therefore his function would be much less likely to be successful.

I therefore admitted this evidence, which was tendered by Mr. Latey.

Solicitors: *Hand, Morgan & Co.*; *Layton & Co.*

(1) [1949] P. 94.

J. B. G.

1950
Feb. 1.

Willmer J.

In re HALL, DECD.

Probate — Administration — Grant — Application by single person — Deceased intestate—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *ss.* 160, 162—*Administration of Justice Act*, 1928 (18 & 19 *Geo.* 5, *c.* 26), *s.* 9.

The court was not given power by s. 9 of the Administration of Justice Act, 1928 (which amends s. 162 of the Supreme Court of

Judicature (Consolidation) Act, 1925) to dispense with a second administrator: had the legislature intended by that section to make provision for dispensing with the requirements of s. 160 of the Act of 1925 it would have made that intention clear in the amending statute; and, moreover, the proviso added to s. 162 of the Act of 1925 by s. 9 of the Act of 1928 refers to the class of person suitable for appointment, being directed to the personality of the administrator and not to the number of administrators.

In re White [1928] P. 75 (decided before the passing of the amending Act), followed.

PROBATE MOTION.

The deceased, William Samuel Hall, died intestate in 1947 at the age of 79 years, leaving him surviving three brothers and two sisters, of whom Charles Edward Hall was the applicant. In 1898 the deceased married one Florence Duffin. There was a deed of separation in 1905, and shortly afterwards Mrs. Hall went with the only child of the marriage, who was born in 1899, to Canada. Apart from a letter written by an employer of Mrs. Hall in Nova Scotia in 1906, nothing further was heard of her or of the child, although the deceased made inquiries by advertisement and otherwise in 1933 and in 1937 and 1938.

The two sisters, and two of the brothers, renounced their right and title to letters of administration of the estate of the deceased in favour of the applicant. The value of the estate of the deceased was some 1,200*l.*

The court was moved "to decree under the authority "of s. 162 of the Supreme Court of Judicature (Consolidation) "Act, 1925, as amended by s. 9 of the Administration of "Justice Act, 1928, letters of administration of the estate "of the deceased to be granted to the said Charles Edward "Hall."

The question arose whether s. 162, as amended by s. 9 of the Administration of Justice Act, 1928, gave a discretionary power to the court to grant letters of administration to one person only, notwithstanding the requirements of s. 160 (1).

(1) Supreme Court of Judicature (Consolidation) Act, 1925, s. 160: "(1.) Probate or administration shall not be granted "to more than four persons in "respect of the same property, "and administration shall, if "there is a minority or if a life "interest arises under the will "or intestacy, be granted either "to a trust corporation, with "or without an individual, "or to not less than two "individuals . . . ."

W. G. H. Cook for the applicant. The proviso to s. 160, sub-s. 1, of the Judicature Act, 1925, requires only prima facie evidence whether there is a subsisting life-interest or not for the purposes of that sub-section. There is no such prima facie evidence in this case.

Even if there is a life interest, however, s. 162, sub-s. 1 (*b*), of the Judicature Act, 1925, as amended by s. 9 of the Administration of Justice Act, 1928, gives the court jurisdiction to grant letters of administration to a sole administrator because the addition of the words " notwithstanding anything " in this Act," that is, the Act of 1925, as amended, must be taken to have overruled the decision of the Court of Appeal in *In re White* (1). It had been held by Lord Merrivale P. in *In re Herbert* (2), that the court had jurisdiction to make a grant to a sole administrator notwithstanding a minority. This contention is supported by the note to s. 162 in Halsbury's Statutes (2nd ed.), vol. 9, at p. 778.

WILLMER, J. I have no doubt that this is a proper case for a grant under s. 162 of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by the Administration of Justice Act, 1928, s. 9. The question has been debated, however, whether this grant should be made to a single administrator or whether it is necessary that two should be appointed in view of the provisions of s. 160 of the Act of 1925. The value of the deceased's estate exceeds 1,000*l.*, and there is no direct evidence whether the wife is alive or dead. There may therefore be a subsisting life interest.

Section 162 (as amended by s. 9 of the Administration of Justice Act, 1928) : " In granting " administration the High Court " shall have regard to the rights " of all persons interested in the " estate of the deceased person " or the proceeds of sale thereof " . . . . Provided that (*a*) where " the deceased died wholly intestate as to his estate, administration shall be granted to " some one or more persons " interested in the residuary estate " of the deceased, if they make " an application for the purpose . . . . and (*b*) if by reason of " the insolvency of the estate of " the deceased or of any other " special circumstances it appears " to the court to be necessary or " expedient to appoint as administrator some person other than " the person who, but for this " provision, would by law have " been entitled to the grant of " administration, the court may, " in its discretion, notwithstanding " anything in this Act, appoint " as administrator such person " as it thinks expedient, and any " administration granted under " this provision may be limited " in any way the court thinks fit."

(1) [1928] P. 75 (decided July, 1927).

(2) [1926] P. 109.

It has been argued on two grounds that this is a proper case in which to make a grant to one administrator only. First, it is contended that on the evidence available there is sufficient material to satisfy me that the deceased's wife is dead. Without going into the facts in detail, it is sufficient for me to say that I am not so satisfied on the evidence before me.

Secondly, however, it is contended that, even if the wife is, or may be, still alive, the court is given jurisdiction to dispense with a second administrator, having regard to the amendment of s. 162 of the Supreme Court of Judicature (Consolidation) Act, 1925, by s. 9 of the Administration of Justice Act, 1928. It is argued that in consequence of that amendment the decision of the Court of Appeal in *In re White* (1), given in 1927, is no longer binding, but that the effect of the amendment is to restore the position as it was stated to be in *In re Herbert* (2). Counsel referred to a note in Halsbury's Statutes (2nd ed.), vol. 9, at p. 778, where this view is expressed by the learned editors. There is no reported decision on the point since the passing of the amending Act of 1928. The question turns on the true construction of the wording of the proviso to s. 162 as now amended. Having carefully considered the wording of this proviso, I am not satisfied, as a matter of construction, that it was ever intended to enable the court to dispense with a second administrator in a case of this character. In my judgment the new proviso concerns the class of person suitable for appointment; it is directed to the personality of the administrator and not to the number of administrators. Had the legislature intended to make provision for dispensing with the requirements of s. 160 it would have been very easy to make that intention clear in the amending statute.

The conclusion to which I have come, therefore, is that in this case two administrators must be appointed. I have been informed that the applicant's wife has expressed herself as willing to act as a second administrator. She would appear to be a suitable person so to act, and I will therefore make an order appointing her, subject to her consent being filed.

Order accordingly.

Solicitors: *Blyth, Dutton, Wright and Bennett, for Jasper and Nicholson, Southampton.*

(1) [1928] P. 75. (2) [1926] P. 109.

J. B. G.

1950
Feb. 15, 24.

Willmer J.

ROSS *v.* ROSS.

Husband and wife—Divorce—Maintenance—Wife's application to High Court—Existence of justices' order—Whether in circumstances a binding election made by wife—Whether such an election possible.

A statement at the conclusion of a defended divorce suit by counsel for a successful wife that no question of maintenance will arise as she proposes to rely on an existing maintenance order of a court of summary jurisdiction does not constitute such an election as will preclude her from subsequently putting forward a claim for maintenance in the High Court. Neither is she so precluded by having relied on the justices' order after filing an application for maintenance in the High Court. For in such circumstances a wife has never been in the position of having to elect between alternative or inconsistent remedies: she has never had more than one remedy open to her, namely, an order for maintenance against the husband; she has only had a choice of courts in which to pursue that remedy.

Even if a wife, however, by the statement of her counsel, and by subsequent reliance on an order of justices, should purport to make an irrevocable election not to apply for maintenance in the High Court, such an election would offend against the principles in *Hyman* v. *Hyman* [1929] A. C. 601, and would not be binding.

After the court had granted her a decree nisi, a wife stated by her counsel that no question of maintenance would arise because she proposed to rely on an existing justices' order. She nevertheless applied within two months of the decree absolute to the High Court for maintenance, and while the application was pending took out a summons for arrears under the justices' order. On her husband's contending, by way of opposition to her application to the High Court, that she had by her conduct made an irrevocable election to rely on the justices' order,

Held, that there had been no such election; that, however, since she could not have an order in force at the same time both in the High Court and in a court of summary jurisdiction, she must decide whether to rely on the justices' order or to have that order discharged so as to make way for an order of the High Court; and that the application must accordingly be adjourned for twenty-eight days to enable her to reach a decision.

Kilford v. *Kilford* [1947] P. 100, followed.

SUMMONS adjourned into open court.

A wife obtained a decree nisi of divorce on May 4, 1949, at the Manchester Spring Assizes. The decree was made absolute on June 17, 1949. There was no prayer for maintenance in her petition, and her counsel stated in open court at the conclusion of the hearing that there would be no question of maintenance, as the wife proposed to rely on a justices' order which she had obtained in 1945.

On August 15, 1949—two months less two days after the final decree (see r. 44, sub-r. 1, of the Matrimonial Causes Rules, 1944)—the wife filed in the High Court the present application for maintenance. She had then taken no steps towards the discharge of the justices' order. On October 26, 1949, she took out a summons for arrears under that order (some of which the husband subsequently paid). On October 27, 1949, she applied for the first time for the discharge of the justices' order. Both summonses were adjourned sine die pending the hearing of the present application, which was heard in the first place by the district registrar on December 5, 1949. The justices' order was therefore still in force at the hearing of the present summons. The district registrar referred the matter to the judge in view of the point of law which was raised.

Comyn for the husband. The wife had a justices' order in her favour at the time when the decree was pronounced, and that order was still in force when she issued her summons for maintenance in the High Court on August 15, 1949. She had taken no steps to have the order discharged before that application, and has, in fact, since issued a summons for arrears. At the trial her counsel informed the court that she intended to rely upon the justices' order.

In *Kilford* v. *Kilford* (1) Barnard J. said: "A successful "wife petitioner, who has previously obtained a maintenance "order from justices, must elect either to retain that order "or obtain an order in the Divorce Court." By her counsel's statement and by her subsequent failure to take any steps to have the justices' order discharged before applying to the High Court, the wife has made her election to rely on that order and thereby waived any rights she might have had in the High Court. [He referred to *In re Shepherd: Harris* v. *Shepherd* (2).]

Fay for the wife. *Kilford* v. *Kilford* (3) decides no more than that the wife cannot have two orders at once. Where Barnard J. in that case spoke of "election" (4) he was using the word in its informal sense as denoting "choice."

(1) [1947] P. 100, 102.
(2) (1942) 59 T. L. R. 50.
(3) [1947] P. 100.
(4) Ibid. 102.

Election in the strict sense of an irrevocable decision only operates where the litigant has the choice of two inconsistent remedies: *Scarf* v. *Jardine* (1); *Morel* v. *Earl of Westmoreland* (2). Where the remedies are not true alternatives, there is no election: *In re Davidson* (3). In the present case the wife petitioner has one remedy but a choice of courts, just as a litigant may have a choice between the High Court and county court.

[WILLMER J. If a plaintiff starts an action in both courts will not the court put him to his election ?]

Yes, but until the court does this he has a locus pœnitentiæ. Moreover, the statutory provisions enabling a petitioning wife to seek maintenance in the High Court were not made solely in the wife's interest, and she cannot contract out of those provisions: *Hyman* v. *Hyman* (4); *Gaisberg* v. *Storr* (5). If she cannot contract out, a fortiori she cannot elect out.

Finally, even if she can elect, she cannot bind the child of the marriage by the election: *Ward* v. *Baugh* (6); *Fytche* v. *Fytche* (7).

Comyn in reply. *Hyman* v. *Hyman* (4) lays down that there can be no ousting of the court's jurisdiction in advance. This case does not concern the ousting of jurisdiction, but election. [He referred to Halsbury's Laws of England (2nd ed.), vol. 13, at p. 584, on the power of counsel or solicitor to bind his client.]

Cur. adv. vult.

Feb. 24. WILLMER J. [reading his judgment, referred to the facts and continued :] It is contended on behalf of the husband that the wife has elected to take her remedy elsewhere and can no longer be allowed to put forward a claim for maintenance in this court.

It is well established that a wife cannot obtain an order for maintenance in this court, while at the same time retaining in force an order previously obtained from a court of summary jurisdiction: see *Kilford* v. *Kilford* (8). In that case a wife had previously obtained an order from a court of summary jurisdiction, with which for the time being she was satisfied; but in order to safeguard her future position she sought,

(1) (1882) 7 App. Cas. 345.
(2) [1904] A. C. 11.
(3) (1884) 13 Q. B. D. 50.
(4) [1929] A. C. 601.
(5) [1950] 1 K. B. 107.
(6) (1799) 4 Ves. 623.
(7) (1868) L. R. 7 Eq. 494.
(8) [1947] P. 100.

while the justices' order was still in force, to obtain in addition a nominal order for maintenance in this court. Barnard, J., however, refused to entertain the application so long as the justices' order was in force, and left the wife to choose either to rely on the justices' order or to have the justices' order discharged before proceeding with her application in this court. In the present case the wife is content that I should take a similar course, and I am invited to make an order for maintenance in her favour on the understanding that the application to discharge the justices' order will be proceeded with forthwith. For the husband, however, it is objected that in this case the time for such a choice is now past, and it is said that the wife has already made an irrevocable election to rely on the justices' order. It is contended that, having regard to the statement made by her counsel at the trial, coupled with her subsequent conduct in retaining the justices' order in force after the filing of the present application—and indeed after the last date on which the application could have been made without leave—the wife has made an election, within the principle stated by the House of Lords in *Scarf* v. *Jardine* (1), and, having made that election, is precluded for all time, and in all circumstances, from obtaining an order for maintenance in this court.

The doctrine of election, as I understand it, applies in a case where a plaintiff has alternative remedies, and it is held that where he has once elected to pursue one he has waived his right to the other and is for ever precluded from asserting it. This is nowhere made clearer than by the words of Cave J. in *In re Davison, Ex p. Chandler* (2), where he said: "This "doctrine applies only where the person having the cause "of action is put to elect between two inconsistent remedies, "as in the case of the right to sue either the agent or the "principal when disclosed: *Curtis* v. *Williamson* (3); or "the old and new partners in a firm where the old partners "are liable only by estoppel, as in *Scarf* v. *Jardine* (1); or "in the case of the right to sue for a tort or to waive the tort "and sue for the proceeds in the hands of the wrongdoer. "In these cases the plaintiff may elect which remedy he "will have, but when he has elected one remedy he has "thereby waived his right to the other." In the present case, as it seems to me, the wife was never in the position of having alternative or inconsistent remedies; she never had more than one remedy open to her, namely an order for maintenance against the husband; but she had a choice of courts in which she might pursue that remedy. The position, as I see it, is somewhat analogous to the case where proceedings in respect of substantially the same cause of action are pending at the same time in two different courts. Of this class of case *McHenry* v. *Lewis* (1), is a well known example. In such cases it has never, so far as I know, been suggested that a plaintiff, by instituting proceedings in one court, has irrevocably elected to pursue his remedy only in that court, so as to be precluded for all time from proceeding elsewhere. On the contrary, it is clear that, on a motion to stay proceedings on the ground of lis alibi pendens, the court has a discretion to stay or not to stay the proceedings, and may at that stage put the plaintiff to his election as to the court in which he will proceed. I very much doubt, therefore, whether the doctrine of election, as enunciated in the cases referred to, could ever be applied to a case such as the present, where the wife's only choice so far has been as to the court in which she will pursue the remedy which she undoubtedly has.

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(1) 7 App. Cas. 345.
(2) (1884) 13 Q. B. D. 50, 54.
(3) (1874) L. R. 10 Q. B. 57.

In any event I am not satisfied, on the facts of the present case, that the wife has ever so far done anything which could be dignified by the name of an election, in the sense of a final and irrevocable choice. The words used by her counsel at the trial of the suit appear to me to amount to no more than a statement of present intention—an explanation to the court as to the reason for the absence of any prayer for maintenance in the petition. If the petitioner were to be held irrevocably bound by any such statement by counsel, it would seem to be logical to say that she would equally be bound by a similar intimation in the course of solicitors' correspondence at any stage of the proceedings. Carrying the argument one stage further, why should she not be said to have made an irrevocable election by including no claim for maintenance in her petition? Plainly such a contention would be absurd; yet logically I do not see why a statement by counsel at the trial, in the circumstances in which this statement was made, should be treated as having any more binding effect. The fact is that by the rules made under the statute a petitioner is not required to assert her claim for maintenance until decree absolute and two months thereafter; moreover, even after that time she may still assert such a claim by leave of the court. Up to the time when this application was in fact filed, namely, August 15, 1949, I cannot see that the wife had done any unequivocal act, within the principles laid down in *Scarf* v. *Jardine* (1), such as to show an irrevocable election to rely only on the justices' order and to waive her rights in the High Court. Reliance is placed on the fact that after that time, and notwithstanding the filing of the present application, she continued to retain the justices' order in force. But it seems to me that the most that can be said against her in that respect is that her conduct after August 15, 1949, was equivocal. Nothing that happened after that date could be regarded as evidence of an irrevocable election in favour of the justices' order.

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(1) (1882) 22 Ch. D. 397.

Assuming that I am wrong in all that I have said so far, however, it appears to me that there is another fatal objection to the husband's contention: even if the wife, by the statement of her counsel and by her subsequent conduct, did purport to make an irrevocable election not to apply for maintenance in the High Court, such a purported election would, in my judgment, offend against the principles laid down by the House of Lords in *Hyman* v. *Hyman* (2), and would not be binding on her. In that case it was held that the terms of a separation agreement entered into before the institution of divorce proceedings could not be relied on to oust the jurisdiction of the court to award the wife maintenance. But the members of the House made it clear that in their view any agreement entered into between the parties at any stage, whereby it was sought to limit or control the jurisdiction of the court to award maintenance to a wife, would be void and unenforceable. The reason for this is that the right to maintenance is accorded to a wife by statute as much in the public interest as for her own benefit, and it is therefore a right which it is not competent for her to renounce or barter away by agreement. The same principle was recently followed by the Court of Appeal in *Gaisberg* v. *Storr* (3), where it was held that a husband's undertaking, given during divorce proceedings, to make weekly payments, in consideration of

(1) 7 App. Cas. 345.
(2) [1929] A. C. 601.
(3) [1950] 1 K. B. 107.

the wife undertaking not to apply for alimony pending suit or for permanent maintenance, did not in any way preclude the wife from claiming alimony pending suit or permanent maintenance. Applying the same principles to the present case, if it is not competent for a wife by agreement to contract out of her statutory right to claim maintenance in this court, I do not see how it is possible for her, by any unilateral statement or conduct on her part, to renounce or waive that right, at any rate up to the time of decree absolute and two months thereafter.

It was further argued by counsel on behalf of the wife, following the principles applied in *Ward* v. *Baugh* (1), and *Fytche* v. *Fytche* (2), that, even assuming the wife herself to be barred by an irrevocable election on her part to rely only on the justices' order, such an election could not in any circumstances bind the child of the marriage, so as to bar a claim for maintenance in this court on its behalf. In view of the conclusion already stated, it is unnecessary for me to express any opinion on this further point; I merely refer to the argument presented to me so as to keep the point open in the event of an appeal.

This being my conclusion on the question of law argued before me, it remains for me to consider what order I ought to make in the circumstances. I was invited by counsel on both sides to regard the whole matter, including all questions of quantum, as being referred to me, and, in the event of my deciding (as I have decided) that the claim is not barred, to proceed forthwith to the making of a maintenance order. It should be stated that the question of quantum has already been considered by the district registrar, who has already reached a tentative conclusion as to what would be an appropriate sum by way of maintenance for the wife and child respectively, assuming that the claim is admissible. After consideration I have come to the conclusion that, notwithstanding the invitation of counsel, it would be wrong for me to make an order for maintenance at the present stage. To do so now, while the justices' order is still in force, would be contrary to the ruling in *Kilford* v. *Kilford* (3), by which I hold myself bound, and with which in any case I agree. It is stated in Rayden on Divorce, 5th ed., p. 473, correctly in my judgment, that the court will not hear the application and make an order subject to the discharge of the justices' order. The wife can have only one order in force at one time. If I make an order now, as I am invited to do, the wife will have two orders in force at the same time, and she will be in a position to enforce whichever appears to her the more favourable, and to apply for the discharge of the other. In my judgment she is not entitled to be put in any such privileged position. I propose to follow Barnard J. in *Kilford* v. *Kilford* (1), and to say that the petitioner must now make up her mind whether she will rely on the justices' order, or whether she prefers to have that order discharged so as to make way for an order of this court. I propose, therefore, to adjourn this application for twenty-eight days. If at the expiration of that time the justices' order remains undischarged, this application will stand dismissed. But if within that time the wife shall have obtained the discharge of the justices' order, she will be at liberty to renew this application before the district registrar, to whom I refer the matter to make such order as he may think fit.

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(1) 4 Ves. 623.
(2) L. R. 7 Eq. 494.
(3) [1947] P. 100.

Since this result amounts to a substantial success for the wife, I think that she should have her costs of the proceedings both before the district registrar and before me. Such costs as may be incurred on any renewal of the application before the district registrar I reserve to him. But without wishing in any way to fetter his discretion in the matter of costs, I think it is proper to point out that if the wife feels that the justices' order is inadequate in present conditions the justices now have jurisdiction under the Married Women (Maintenance) Act, 1949, to award substantially larger amounts, so that she is in no way bound to have recourse to this court in order to obtain a more favourable order.

Application adjourned.

Solicitors: *Brighouse, Jones & Co., Southport; Haslewood, Hare & Co.*

(1) [1947] P. 100.

J. B. G.

1950
Feb. 8.

Pilcher J.

MORE *v.* MORE.

Husband and wife—Divorce—Desertion—Respondent a voluntary patient in mental hospital.

A husband was in a mental hospital as a voluntary patient for a period of over ten years. During the first five years the wife paid him regular visits, but he treated her with indifference and failed to take any interest in a practical plan which she put forward for setting up a matrimonial home. As a voluntary patient the husband was free to leave the hospital upon giving 72 hours' notice of his intention to do so. During his wife's visits the husband was quite rational in his conversation and discussed general matters with her; but whenever she talked of resuming married life he showed no interest, and he ignored her suggestion that he should take work on a farm with her brother, although he used to work in the hospital garden and kitchen. In 1943 the medical superintendent reported that there was no question of his certification. The wife eventually discontinued her visits, and in March, 1949, presented a petition for divorce on the ground of desertion. Medical evidence was given that up to the date on which the petition was presented the husband knew that he had a wife and that it was a man's duty to live with his wife, but that he was nevertheless content to stay where he was. His mental condition deteriorated after the date of the petition, and by November, 1949, he had become certifiable.

Held, that, notwithstanding his residence in a mental hospital as a voluntary patient, the husband was capable of having a deserting mind up to the date on which the petition was presented, that he had a deserting mind, and that his wife was therefore entitled to a decree of divorce.

PETITION for divorce.

The wife alleged that the husband had deserted her for at least three years immediately preceding the presentation of the petition. The petition was filed on March 31, 1949, and served personally on the husband on April 14, 1949. He was at that time, and had been since 1938, a voluntary patient in a mental hospital. An answer was filed in which the Official Solicitor, as guardian ad litem to the husband, denied the alleged desertion and pleaded "that at all material "times he has been incapable of forming any animus deserendi "or revertendi."

The marriage took place early in 1938. Towards the end of that year the husband developed a mental illness which resulted in two assaults being made by him on his wife, and he entered a mental hospital as a voluntary patient, signing a consent to do so.

The wife visited him regularly during the next five years, but she ceased to do so after 1943 in view of his indifference towards her. Medical evidence on affidavit was accepted by the court concerning the mental condition of the husband on February 26, 1949, and in April, 1949. There was also evidence that his mental condition had considerably deteriorated by the end of 1949, and that he was then certifiable.

William Latey for the wife. The husband entered the hospital as a voluntary patient in 1938 and has remained there ever since. There has never been any order for his detention or care and treatment within the meaning of s. 3 of the Matrimonial Causes Act, 1937. In law he has always been entitled to leave and return to his wife on giving 72 hours' notice. In *Williams* v. *Williams* (1), *Bennett* v. *Bennett* (2), and *Rushbrook* v. *Rushbrook* (3) it was held that where a respondent within three years immediately preceding the petition has been certified he cannot possess the animus deserendi and cannot therefore be said to have deserted the petitioner for the whole of the period laid down by statute for the remedy of divorce. But where the person concerned is not certified it is a question of fact whether or not a voluntary patient is capable of the intention to desert and to continue to desert the other spouse: *Monckton* v. *Monckton* (4). In *Brown* v. *Brown* (5), Lord Merriman, P., in finding desertion against a "feeble-minded person," said (6) that a "feeble-"minded person" within s. 1 of the Mental Deficiency Act, 1927, was three statutory removes away from a person of unsound mind. It is submitted that a voluntary patient subject to no order should be regarded as in the fourth remove. On the evidence it would seem that this husband knew perfectly well that he had left his wife for years, though he had the duty of consortium, and that he was free to join her if he desired. There were similar circumstances in *Woolner* v. *Woolner* (7) before Mr. Commissioner Grazebrook, K.C. There the wife was a voluntary patient who refused to leave a mental hospital in which she had been living for some years and join her husband, and the commissioner, who had great experience of this class of case, had no difficulty in finding desertion against her.

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(1) [1939] P. 365.

(2) Ibid. 274.

(3) [1940] P. 24.

(4) [1942] P. 28.

(5) [1947] P. 95.

(6) Ibid. 99.

(7) March 17, 1949, not reported. No evidence was called by the Official Solicitor, for whom counsel stated that a report made to the Official Solicitor showed that the respondent could leave the mental hospital in which she was living at any time. Mr. Commissioner Grazebrook, K.C., said, after hearing the evidence: "The doctor's

Stuart Horner for the Official Solicitor as guardian ad litem of the husband. The husband is now certifiable, and it would appear from the evidence that he has not been capable of forming an animus revertendi for some months. This case is more difficult than *Woolner* v. *Woolner* (1); but, in addition to the evidence of present incapability, there is evidence from which the court may hold that the husband had the necessary deserting mind up to the time of the presentation of the petition.

Pilcher J. referred to the facts and continued: For five years, from the time of the husband's admission until 1943, his wife used to visit him once a month and remain with him for half an hour to an hour; that was all that she was permitted to do as a visitor. She has given evidence that he always recognized her and that he appreciated that he could leave the hospital whenever he liked. She said that he took interest in illustrated papers, that he appreciated the cigarettes and sweets that she brought him, but that he appeared indifferent to any local news which she imparted to him; and that when she suggested, as she did on more than one occasion towards the end of this five-year period, that he should consider coming out and resuming married life with her, he evaded the question and changed the subject. In 1943 the wife, who was living with her brother, told her husband, as was the fact, that her brother was prepared to set her and her husband up in a little house attached to a farm, and that she hoped that it would prove attractive to her husband who was apparently interested in agricultural matters. He refused, however, to take any practical interest in the suggestion; and, in view of her failure to interest her husband in this practical project, and of his indifference to anything she spoke about when she went to see him, she discontinued

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"evidence here is very clear. "The respondent had the mentality to go out if she wanted "to and to make up her own "mind one way or the other. "The evidence shows that she "decided not to leave, but "preferred to stay where she was. "I grant a decree nisi."

(1) (1949) Not reported.

her visits and shortly afterwards went to see a solicitor with the object of discovering whether or not she could obtain a divorce. Whether at that time she had formulated the matter in her own mind with any great clearness, I do not know; but it is certain that consideration was given to the question whether or no there was any prospect of her obtaining a decree on the ground that her husband had been incurably of unsound mind during the five years preceding any petition which might be presented. It is not surprising that the doctors who were consulted came to the conclusion at that time that he was not certifiable. The wife therefore had to abandon her project of attempting to secure a decree on the ground of her husband's incurable insanity.

In 1948 the wife, who was about thirty-nine years of age and wished to marry again, approached her present solicitors and discussed the possibility of obtaining a divorce on the ground of her husband's desertion, inasmuch as he was not, so she was advised, insane. A doctor who was invited to examine the husband made this report: "I found no evidence of organic "disease, except some bad teeth. There was no evidence of "toxicity. I spent about one hour and a quarter asking "him questions. He answered pleasantly and readily. He "only remembered vaguely the onset of his illness and his "having a row with his wife, but he seemed to have a vague "idea that there were some strange influences about the house "at the time. He lacks initiative and seemed to have no "idea what he would do and where he would go if he took "his discharge from the hospital. There does not appear "to be any actual mental deterioration though he is vague "and at times his memory is badly at fault." After saying that there was no medical urgency for his certification as a person of unsound mind, the doctor continued: "His "intellectual capacity is such that he knows he has a wife "and that it is a man's duty to live with his wife. I obtained "the firm impression that over a period of well over three "years before I saw him he was staying in the hospital of "his own accord though capable of making a contrary "decision. The fact is that he is quite content to stay where "he is, and has no desire to leave, either to go to his wife or "anywhere else."

That report was made as a result of a visit paid by the doctor on February 26, 1949, and the petition was filed on March 31, 1949. Accordingly, if the wife desires to obtain a decree on the ground of her husband's desertion, she has to satisfy the court that her husband had deserted her for a period of at least three years preceding the presentation of the petition, that is, during the three years which passed between March 31, 1946, and March 31, 1949. Her husband has clearly been absent during those years, and I am satisfied that, had he been willing to return, she would have been prepared to receive him back in spite of her effort in 1943 to see whether she could obtain a decree of divorce on the ground of his incurable insanity.

The husband having been absent from his wife during those three material years, I have to be satisfied that he knew what he was doing, in the sense that he knew that he had a wife, that it was the duty of an ordinary married man to live with his wife, that he was not living with his wife, and also that he could leave the hospital if he desired, on giving proper notice.

On the evidence to which I have referred I should have been prepared to find that this was in fact his state of mind during the three material years; and the only thing that has caused me some doubt about the matter is that it is clear that, whatever this unfortunate man's mental condition may have been on March 31, 1949, when the petition was filed, or on the date in February, 1949, when he was seen by the doctor, his mental condition has considerably deteriorated since. It is clear that by the end of November, 1949, the medical superintendent had come to the conclusion that the husband's mental condition had so much further deteriorated that he was at that date certifiable.

It is necessary that I should find that the husband appreciated what he was doing not only during the first part of the three years' desertion, but throughout the period, up to the last day; and I have to make up my mind, being satisfied as I am on the evidence of the doctor that, on February 26, 1949, the husband was capable of having an animus deserendi and an animus revertendi, and being satisfied that by August of that year he was not capable of having either an animus deserendi or an animus revertendi, at what point between those two dates he ceased to be capable of forming the necessary intention. The period with which we are concerned ended on March 31, 1949, and I have an affidavit from the doctor who was medical superintendent of the hospital in question from May, 1947, until April, 1949, in which he states: "I have no doubt "that he [the husband] was fully conscious of the facts that "he had a wife, that he had been living apart from her of "his own accord, and that a husband normally lives with his "wife." In this case naturally one's sympathies are all with the wife, and I am very happy that the evidence which has been put before me enables me to hold that her husband had the necessary deserting mind during the three material years, and so to grant her a decree on the ground of his desertion.

1950
MORE
v.
MORE.
Pilcher J.

Solicitors: *Herbert Oppenheimer, Nathan & Vandyk; The Official Solicitor.*

J. B. G.

MUDGE *v.* MUDGE AND HONEYSETT (GOODWIN CITED)

1950
Feb. 6, 7.
Hodson J.

Husband and wife—Divorce—"Passive acquiescence"—"Corrupt "intention"—Wife seen to commit adultery by husband watching with inquiry agents.

If a man, without lulling into a sense of security the wife about whom he is suspicious, does nothing and watches her commit adultery, he is not thereby necessarily guilty of such a passive acquiescence with a corrupt intention, within the meaning of Lord Merriman P.'s judgment in *Churchman* v. *Churchman* [1945] P. 44, 52, as would amount to connivance.

A husband who was suspicious of his wife's chastity watched her and the co-respondent through a ground-floor bedroom window while the act of adultery which was alleged in the husband's petition (and which the court held to be proved) took place. The husband was accompanied at the time by private detectives, one of whom gave evidence in his support. The wife by her answer denied adultery and pleaded that, if she had been guilty of adultery, the husband had connived at and been accessory to it.

Held, that the husband's actions did not constitute connivance, and that he was accordingly entitled to a decree, the situation being exactly the same as if the husband had not been present when the adultery was committed, but had merely sent agents to watch his wife.

PETITION for divorce.

The petitioner, Raymond Mudge, alleged that his wife, Mary Lavinia Mudge, had committed adultery with the co-respondent, Honeysett, on December 9, 1948, in a bedroom on the ground floor of a certain house. The wife denied the alleged adultery, and pleaded that, if she had been guilty of adultery, the husband had connived at and been accessory to it.

The following particulars of the alleged connivance were given: "The husband was on the night of December 9, "1948, present at the said house . . . . and at all material "times kept within sight and/or within hearing of the wife "and co-respondent but neglected or failed to prevent the "wife committing adultery with the co-respondent."

The wife further alleged that the husband had committed adultery with the party cited, and prayed for a decree of divorce in the exercise of the court's discretion.

By his reply the husband, while admitting that he was present near the house on the night of December 9, 1948, denied connivance. He also denied that he had committed adultery. The party cited also denied the alleged adultery.

Turner, K.C. and *Van Oss* for the husband and the party cited.

Melford Stevenson K.C., Andrew Lyell, and *W. Scrivens,* for the wife.

The co-respondent did not appear and was not represented.

HODSON J. found as a fact that adultery had not been committed between the husband and the party cited, dismissed the party cited from the suit, and continued: I find the adultery, as against the wife and the co-respondent, clearly proved. But the question of connivance must be approached with care, for there are difficulties in laying down general propositions about what is or is not connivance. The fact that the husband was watching on the night in question, in company with detectives, is not disputed; and the fact that while he was watching through the window adultery took place between the wife and the co-respondent after some little time had elapsed is not disputed either. It is contended that, in such circumstances, a man who does nothing to stop his wife's committing adultery is conniving at her adultery by passive acquiescence. To my mind the situation would be exactly the same if he had not been there at all himself, but had merely sent agents to watch his wife. He was, as I find, suspicious of his wife's chastity and had reason to believe that she had committed adultery in the past. Whether he was present himself or whether he sent detectives, the question is: did he connive at his wife's adultery by simply doing nothing to prevent her from committing it?

A recent case on the subject of connivance in the Court of Appeal was *Churchman* v. *Churchman* (1), in which Lord Merriman P., said (2): " . . . . it is of the essence of connivance that it precedes the event and, generally speaking, the material event is the inception of the adultery and not its repetition, although the facts may be such that connivance at the continuance of an adulterous association shows that the husband must be taken to have connived at it from the first." Lord Merriman P., also said (3): " Much of the difficulty in dealing with the question of connivance arises from the fact that in the past judges have gone beyond the facts of the particular case in an attempt to lay down general principles of wider application. In our opinion it is of the utmost importance to bear in mind that the issue is whether, on the facts of the particular case, the husband was or was not guilty of the corrupt intention of promoting or encouraging either the initiation or the continuance of the wife's adultery; and that the court should not allow its judgment to be affected by importing, as principles of universal application, pronouncements made with regard to wholly different circumstances, and so be led to a conclusion contrary to the justice of the case."

I have thought it desirable to read that passage before referring to observations made in older cases, which are said to lay a foundation for the argument that a man who simply does nothing, and watches to see whether his previous suspicions are confirmed, is guilty, as a result of that watching, of connivance. The phrase " passive acquiescence " appears in the judgment of Sir John Nicholl in *Rogers* v. *Rogers* (4). It is not necessary to refer to the facts of that case, but about passive acquiescence Sir John Nicholl said: " Passive acquiescence would be sufficient to bar the husband, provided it appeared to be done with the intention and in the expectation that she would be guilty of the crime; but on the other hand it has always been held that there must be a consent.

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(1) [1945] P. 44.
(2) Ibid. 50.
(3) Ibid. 52.
(4) (1830) 3 Hagg. Ecc. 57, 59.

" The injury must be volenti." Sir John Nicholl later in his judgment quotes this passage from the judgment of Lord Stowell in *Walker* v. *Walker* (1) : " The defence is not a denial " of the fact, but that which, if established, is said to be " equivalent in law. It is said that the husband connived ; " but they do not impute active means, but a passive consent. " I take the position laid down by Dr. Arnold to be the true " doctrine, that passive consent is sufficient ; but there " must be a consent, an acquiescence of his will ; not mere " negligence ; not too high a confidence, or a misplaced con- " fidence : there must be evidence that he was passively " concurrent ; that he saw the train laid for the corruption " of his wife ; that he saw it with pleasure, and gave a degree " of passive concurrence to it."

Some comment has been made in a later case about the apparent irrelevance of the emotion roused in the husband by what he saw ; but the use of the term " passive " acquiescence," if the reference to intention be left out of account, may perhaps be misleading. If a man does nothing, without lulling into a sense of security the wife about whom he is suspicious, and watches her, he is not by any means necessarily guilty of passive acquiescence, with a " corrupt " intent", within the meaning of the language used by Lord Merriman P., in *Churchman* v. *Churchman* (2). In this case the wife was not in any sense lulled into a false sense of security, because she had no knowledge of the observation of her husband. I have already indicated that in my opinion it makes no difference at all whether the watching or the passivity were those of the husband himself or of his agents : qui facit per alium facit per se.

Attention was drawn to *Pearl* v. *Pearl and Lees* (3), a Canadian case, where the opposite conclusion was reached in circumstances very like these. I cannot see that the actual method by which the husband watches—whether he instals himself inside the house or outside the house, or whether he employs others to do the watching for him—can make any difference, although I agree with Laidlaw J., in being shocked by the circumstances of the particular case before him. It is obviously revolting to consider circumstances of that kind, where a man is perhaps driven to watch in order to see whether or not his wife has fallen. But it does not follow, because the circumstances of the particular case may be more or less unattractive, that there is a variation in the standard of duty imposed by the law. The law does not always set such a high standard in the conduct of persons as may conceivably be set by ethics. But if I were to hold that a man was guilty of connivance who acted as the husband did here—who watched his wife to see whether his suspicions were founded or unfounded and, if founded, were well founded, I should be driven into the position of doing what so far has never been done in this country,—that is, rejecting the petitions of those who, if not doing the watching themselves, have employed others to do this kind of work for them.

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(1) [1796] 3 Hagg: Ecc. 59 n. (*a*).

(2) [1945] P. 44.

(3) [1943] Ontario Rep. 720 ; [1943] 4 D. L. R. 387.

For these reasons I see no ground for the allegation that the husband has either connived at or been an accessory to his wife's adultery.

Decree nisi on the prayer of the husband's petition; prayer of the answer rejected.

Solicitors: for the husband and the party cited, *Gregory, Rowcliffe & Co., for Wood, McLellan & Williams, Chatham;* for the wife, *Isadore Goldman & Son, for E. A. Morling & Sons, Maidstone.*

J. B. G.

In re HOWLETT, DECD.; HOWLETT *v.* HOWLETT (McCANN AND OTHERS CITED.)

1950
Jan. 27.
Ormerod J.

Probate—Practice—Costs—Remuneration of administrator pendente lite—Supreme Court of Jurdicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 163.

Although the unsuccessful party in a probate action who has been ordered to pay the costs of that action must bear any additional cost which has been thrown on the estate by his responsibility for the proceedings, and although a part of that additional cost is clearly costs incurred by, and the remuneration paid to, an administrator appointed pendente lite, or a proportion of them, he should not necessarily be condemned to pay the whole of the costs incurred by the administrator or of his remuneration. Where a portion of the work for which the administrator has been remunerated is work which was necessary in any event in order properly to wind up the estate, there should be an apportionment; and, in determining the amount which the unsuccessful party should be ordered to pay, the registrar must determine what part of the remuneration is referable to work done which was rendered necessary by that party's action.

Fisher and Joy v. *Fisher* (1878) 4 P. D. 231, considered.

SUMMONS ADJOURNED into open court.

The plaintiff in a probate action had propounded the will of the deceased. The defendant, a son of the deceased, had opposed probate, alleging that the testamentary document had been forged, and, in the alternative, that it had been procured by undue influence. The defendant did not in the end pursue those allegations, and the action was disposed of shortly, probate in solemn form being granted to the plaintiff. The defendant was condemned in the costs of the action.

In the course of the proceedings an accountant was appointed administrator pendente lite. The costs of that administrator had been taxed at 85*l.*, and the costs of passing his account at 35*l.*; and his remuneration was fixed by the registrar at five hundred guineas. When the plaintiff's bill was taxed it was sought to include the costs and remuneration of the administrator pendente lite (which had in the meantime been taken by that administrator out of the estate moneys) and to require the defendant to pay the whole. The defendant carried in objections to the taxation, submitting that he should not be ordered to pay the whole of the administrator's costs and remuneration, but only an apportioned part of them.

The registrar disallowed the objections, and the defendant appealed.

K. Bruce Campbell for the defendant. Were it not for s. 163 of the Supreme Court of Judicature (Consolidation) Act, 1925 (1), an administrator pendente lite would be in the same position as an ordinary executor or administrator for whom no provision as to remuneration had been made in a will—that is, he would not be entitled to any remuneration for his services. Power having been given to the court by sub-s. 2 to provide remuneration for an administrator who would not otherwise be paid at all, the section must be construed strictly, and the remuneration can only be paid "out of the "estate of the deceased." It ought not to be recovered out of the pocket of one of the litigants.

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(1) Supreme Court of Judicature (Consolidation) Act, 1925, s. 163, sub-s. 1: "Where any "legal proceedings touching the "validity of the will of a deceased "person, or for obtaining, "recalling, or revoking any grant, "are pending, the High Court "may grant administration of "the estate of the deceased to "an administrator, who shall "have all the rights and powers "of a general administrator other "than the right of distributing "the residue of the estate, and "every such administrator shall "be subject to the immediate "control of the court and act "under its direction.

Sub-section 2: "The court "may, out of the estate of the "deceased, assign to an adminis-"trator appointed under this "section such reasonable remu-"neration as the court thinks "fit."

Alternatively, there should be an apportionment of the costs and remuneration of the administrator. The adminstrator had virtually wound up the estate, and had done much more than was necessary merely to preserve the assets. He was an accountant, who had been able to do, and had done, a great deal of work which would in any event have had to be done by a professional man. If, therefore, the defendant were ordered to pay all the costs and remuneration of the adminstrator pendente lite, the estate would derive a substantial benefit as a result of the action. A successful litigant is sufficiently compensated if he recovers his taxed costs; and to make the unsuccessful litigant do something more than pay the costs of the action is to impose on him a penalty for having invoked, though unsuccessfully, the jurisdiction of the court. The defendant, having been ordered to pay the costs of the action, should be required to pay only those expenses which were incurred by reason of the action, and he should not be called on to pay expenses which would have fallen on the estate even of there had never been an action.

Furthermore, there had in this case been an obstruction by the plaintiff of the administrator in certain of the duties which he had had to carry out, and it would not be right to make the defendant pay such costs as were incurred by reason of the plaintiff's wrong.

The only authority on the matter appears to be *Fisher and Joy* v. *Fisher* (1). The headnote, which states: "In a testa- "mentary suit, condemnation in costs includes all the charges "of an administrator pending suit," is misleading, but the decision itself is clearly in the defendant's favour, and shows that in cases of this kind the unsuccessful litigant should pay only the additional costs occasioned to the estate by the appointment of the administrator.

Percy Hollins for the plaintiff. *Fisher and Joy* v. *Fisher* (1) is authority for the proposition that the unsuccessful litigant

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(1) (1879) 4 P. D. 231; 48 L. J. (P.) 69.

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HOWLETT, DECD., *In re;* HOWLETT *v.* HOWLETT.

who has been condemned in the costs of the action should pay all the costs and remuneration of the administrator pendente lite. It is, moreover, the established practice of the Probate Division that an order for costs such as the one made in this case includes all the costs and remuneration of the administrator pendente lite: see Tristram and Coote's Probate Practice (19th ed.) at p. 439.

ORMEROD J., [after referring to the probate action and to the appointment of the administrator pendente lite, continued:] It is contended by Mr. Campbell that, substantially, the administrator wound up the estate. It is clear that he did everything that was necessary to preserve the estate while the suit was pending; and, when the action was disposed of, some two years or more after the death of the testator, he presented his bill for the costs of the administration and for his remuneration. That remuneration was fixed by the registrar at the sum of 500 guineas; that sum, and other costs of the administration, were properly retained by the administrator from the funds in his hands before he handed the balance over to the plaintiff. The plaintiff's bill of costs against the defendant in the action was taxed by Mr. Registrar Hawkes. The costs and remuneration of the administrator pendente lite which the estate had had to bear were added to the bill of costs, and, although objection was taken on taxation to the inclusion of the whole of these amounts, they were allowed by the registrar.

It is submitted on behalf of the defendant that the work which was done by the administrator was not merely work which was rendered necessary by reason of the action but included work which was necessary in any event to the winding up of the estate, and that, had that work not been done by the administrator, it would have been necessary for the plaintiff to employ professional assistance in the matter. I am not here to decide and I do not propose to decide whether that be so or not.

Mr. Campbell has contended that if that be the position then it is unreasonable that the defendant should pay the costs of the winding up of the estate, except those costs which were rendered necessary by his action. Such an order would mean, he said, that the estate would get the benefit from the defendant of work which had been done by the administrator, of which the estate would otherwise have had to bear the expense. He further contended that the defendant should not pay any part of the administrator's remuneration. He based this contention on the wording of s. 163 of the Supreme Court of Judicature (Consolidation) Act, 1925, whereby the court has jurisdiction to assign out of the estate of the deceased to an administrator appointed under that section such reasonable remuneration as the court thinks fit. It was argued that if it were not for that section this administrator would not be able to obtain any remuneration at all, and that the power of recovering that remuneration could not be wider than is expressed in the section. I do not agree with that contention. In this case the remuneration of the administrator has been paid out of the estate of the deceased, and the only question that now arises is whether the estate can recover from the defendant that additional cost to which the estate has been put by reason of the defendant's action. I am satisfied, therefore, that in the proper circumstances either the whole or part of the cost of this administration can be recovered by the estate or by the plaintiff from the defendant.

Mr. Hollins has contended for the plaintiff that the whole of the administrator's costs and the whole of his remuneration should be paid by the defendant. His argument is, as I understand it, this: but for the action of the defendant, it would not have been necessary to appoint an administrator; and if, in fact, the administrator has done some work in the course of his duty of protecting the estate which would otherwise have had to be done by professional assistance, that is no reason why the estate should not benefit. Mr. Hollins states, further, that his contention reflects the established practice of this Division.

The only authority on the point which appears relevant is *Fisher* v. *Fisher* (1). The report in the Law Journal Reports is of assistance in ascertaining certain facts which appear doubtful in that in the Law Reports, but the result recorded in each report is the same, namely, that an order was made that the unsuccessful party should bear the *additional* costs thrown on the estate by the appointment of an administrator pendente lite. That appears to me to be a sound proposition of law. It is clear that the unsuccessful defendant in a case of this kind must bear any additional cost which has been thrown on the estate by his action in instituting the proceedings, or in being responsible for the proceedings; and a part of that additional cost is clearly the costs and the remuneration, or a proportion of it, which have been incurred by the appointment of an administrator. But equally if in the course of his work the administrator does work in the winding up of the estate which must have been done by a professional man, if it was to be done efficiently, I fail to see why the defendant should bear the burden, and why the estate should receive the benefit because of the defendant's action. In these circumstances, if the facts are that the portion of the work for which the administrator has been remunerated is work which must have been done in any event in order to wind up the estate, then I am satisfied that there should be an apportionment of the remuneration so that the estate may bear its proper portion of the cost of the winding up. The registrar will have to decide whether in fact that is the position, or whether the whole of this remuneration was occasioned by the probate action, when the whole of the facts are placed before him; but in principle I am satisfied that there should be an apportionment, both of the costs and of the remuneration, on the lines which I have indicated, if the facts warrant it. It follows that there must be an order that the bill should go back to the registrar for him to determine whether or not there should be an apportionment of the remuneration and costs of the administrator.

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(1) (1879) 4 P. D. 231; 48 L. J. (P.) 69.

Appeal allowed.

Argument followed as to costs, and on the question whether they should be borne by the defendant if as a result of the registrar's investigation there were found to be no proper case for an apportionment. It was submitted for the defendant that he was entitled to his costs whatever view should be taken by the registrar as to apportionment, for the matter had been argued throughout by the plaintiff as a matter of principle, and on the basis that all the costs of an administrator could properly be charged to an unsuccessful litigant.

ORMEROD J., said that he had treated the matter entirely as a matter of principle from the beginning, and that it was accordingly proper that the defendant should have the costs of these proceedings and of the previous hearing.

Counsel for the defendant having referred to the question of certain costs of the administration alleged to have been caused by the plaintiff, his Lordship said that he did not think that the registrar was concerned about that in the taxation. He would be concerned about the remuneration for work done which was rendered necessary by the defendant's action.

Solicitors: *Warren & Warren*; *Keene, Marsland & Co.*

J. B. G.

HODGKINS *v.* HODGKINS.

C. A.

1950 *Feb.* 16

Bucknill and Singleton L.JJ., and Hodson J.

Nullity—Impotence—Sole evidence of petitioning husband—Whether corroboration needed.

A husband, fourteen years after his marriage, petitioned for a decree of nullity on the ground of his own impotence. The only evidence of his physical disability was the uncontradicted evidence of himself and the medical evidence of a doctor. The divorce commissioner apparently disregarded the medical evidence and, not being satisfied of the husband's impotency on his own uncorroborated evidence, refused a decree. On appeal:—

Held, that no higher standard of proof was required in a case of nullity than in one of divorce and that accordingly in the present case corroboration of the husband's evidence, although desirable, was not essential.

Dictum of Lord Penzance in *U.* (*falsely called J.*) v. *J.* (1867) L. R. 1 P. & M. 460, applied.

Per Hodson J.: It is desirable that this court should make it clear that, in this class of case, corroboration is in practice required unless its absence can be satisfactorily accounted for. The position is exactly the same with regard to nullity as with regard to cruelty.

APPEAL from Judge Willes, sitting as a commissioner in divorce.

The appellant husband petitioned the court for a decree of nullity on the ground of his own impotence. The commissioner dismissed the petition, and the husband now appealed.

Victor Russell for the husband.

The wife was not represented.

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Bucknill L.J. [after stating the facts and reading the evidence and material portions of the commissioner's judgment:] The commissioner apparently, having been minded to believe the husband's evidence, is raising in his mind a doubt, because he thinks that the husband's behaviour is inconsistent with his story. As I understand it, the commissioner is saying: "I cannot understand why, if his story is true, he did not "talk to his father about it, or why he did not go and see "a doctor, or why he did not talk to friends in the Air Force." He is beginning to raise a doubt in his own mind. Then he ends up in this way: "I do not know to what extent I am "called upon to draw obvious inferences from circumstances "which cannot be denied. I am not satisfied that this man "is impotent and I refuse this decree. It may be that my "decision is wrong in law. If so then it will be upset by the "Court of Appeal." Speaking for myself, I must confess that I am left completely at sea as to what the commissioner really has decided. Did he decide that the husband was speaking the truth? Did he decide that he was not speaking the truth? Or did he decide in his own mind that he did not really know whether he was speaking the truth or not? His judgment seems to me to leave the case of the husband in a very unsatisfactory state.

We have looked at a number of authorities on this point—first of all on the question how far a judge, though not legally bound, ought in equity, I suppose, or in common sense, to accept the testimony given on oath in open court by a husband against whom there is nothing to show that he is an unreliable witness, who gives his evidence perfectly straightforwardly, and is prepared to come into court and to admit that he is to some extent impotent, although that is a very unpleasant thing for a young man to have to admit. How far is a judge justified in throwing all that evidence overboard because he thinks that there are elements of doubt raised by the petitioner's conduct in not discussing this delicate matter with somebody else?

In Phipson on Evidence (7th ed.), p. 467, under the heading, "Number of Witnesses, Corroboration" there appears this passage: "As a general rule courts may act on the testimony "of a single witness even though uncorroborated; or upon "duly proved documentary evidence without such testimony "at all . . . . And where that testimony is unimpeached "they should act on it (*Morrow* v. *Morrow* (1)), and need not "leave its credit to the jury . . . . But whenever there are "circumstances of suspicion or the testimony of a witness is "challenged by cross-examination or otherwise, corroboration "thereof is allowed; and in the several cases mentioned below "corroboration is required either by law or well-established "rule of practice."

Morrow v. *Morrow* (1), there referred to, was an interesting case. It was decided in the King's Bench Division in Ireland. The headnote states: "There is no rule of law "precluding a jury in an action for criminal conversation from "acting on the uncorroborated evidence of the plaintiff's wife "as to acts of adultery committed with the defendant." The point was taken in argument whether, according to canon law, it was necessary to have corroborative evidence in a case of that kind. I must discuss that point; but first, as regard corroboration in general, Cherry C.J. said (2): "On the second "point, I cannot find that any court has ever laid down as "a rule of law that in an action for criminal conversation "corroboration of the wife's evidence is necessary. It is most "unusual to examine the wife as a witness to prove her own "guilt; and the cases cited by Mr. MacLoone are authorities "only for the proposition that the confession of the wife to the "husband or a third party, is not evidence as against the "adulterer, it being merely hearsay as against him, and upon "that ground not admissible at all. It is clearly established "by *Robinson* v. *Robinson* (3) that in proceedings for divorce "the admissions or confessions of the respondent are not "admissible evidence against the co-respondent. That is "a question of the admissibility of evidence, and not a question "of corroboration. The same case decides that in a suit for "the dissolution of a marriage the court may act on the "confession of the wife alone. Cockburn C.J. puts that very "strongly at page 393. 'Now' (he says) 'the evidence, as "'has been before observed, consists entirely of admissions "'made by the wife herself; and here a question presents "'itself as to how far admissions of a wife charged with "'adultery, unsupported by any confirmatory proof, can be "'acted upon as conclusive evidence on which to pronounce "'a divorce. If this court had been a court of purely ecclesias-"'tical jurisdiction, the 105th canon, which prohibits

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(1) [1914] 2 I. R. 183.
(2) Ibid. 188.
(3) (1859) 1 Sw. & Tr. 362.

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Bucknill L.J.

" ' the granting of a divorce on the sole and unsupported " ' testimony of the wife, would have precluded us from acting " ' on this evidence. But, as this court is not a court of " ' ecclesiastical jurisdiction, nor bound in cases of divorce " ' a vinculo by rules of merely ecclesiastical authority, it " ' is at liberty to act, and bound to act, on any evidence " ' legally admissible by which the fact of adultery is estab-" ' lished; and if, therefore, there is evidence, not open to " ' exception, of admissions of adultery by the principal " ' respondent, it would be the duty of the court to act on " ' such admissions, although there might be a total absence " ' of all other evidence to support them.' "

The difficulty which arises here is that this is not a petition for divorce: it is a case of nullity. In cases of nullity the court has to act in accordance with the principles and rules on which the ecclesiastical courts have heretofore acted and given relief. That was laid down in s. 22 of the Divorce and Matrimonial Causes Act, 1857, which was in the following terms: " In all suits and proceedings, other than proceedings " to dissolve any marriage, the said court shall proceed and " act and give relief on principles and rules which in the " opinion of the said court shall be as nearly as may be con-" formable to the principles and rules on which the ecclesiastical " courts have heretofore acted and given relief, but subject " to the provisions herein contained and to the rules and " orders under this Act."

That section was repealed by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 226 and sch. VI, but was in substance re-enacted by s. 32 of that Act, which provides: " The jurisdiction vested in the High Court and " the Court of Appeal respectively shall, so far as regards " procedure and practice, be exercised in the manner provided " by this Act or by rules of court, and where no special pro-" vision is contained in this Act or in rules of court with " reference thereto any such jurisdiction shall be exercised " as nearly as may be in the same manner as that in which " it might have been exercised by the court to which it formerly " appertained."

The court therefore has now to find out what was the practice in ecclesiastical courts in cases of nullity before the Act of 1857. The note on that point in Rayden on Divorce (5th ed.), p. 87, is as follows: " Corroboration of the petitioner's " evidence is probably not required as an absolute rule of "law; but the court in practice requires it, unless the absence "of corroborating witnesses can be satisfactorily accounted "for . . . . The ecclesiastical courts invariably required "corroboration by an independent witness: (see Burns "Ecclesiastical Law, 9th ed., vol. 3, pp. 304 et seq.); but as "to the inapplicability of the ecclesiastical rule in this respect "to suits for dissolution of marriage or applications in courts "of summary jurisdiction: see *Robinson* v. *Robinson and* "*Lane* (1)." Then: "Query, whether the ecclesiastical "rule still applies to suits of judicial separation."

The question arises how the Divorce Court dealt with the matter when the Act of 1857 was passed, and the court had to exercise jurisdiction not only in granting for the first time divorces which no court except the High Court of Parliament had previously had power to grant, but also in entertaining suits of nullity which ecclesiastical courts had entertained before that time. It seems to me that, whatever the ecclesiastical courts did before 1857, it is quite clear that the practice of the Divorce Court after 1857 was to say that the same rule as to corroboration should apply in cases of divorce as applied in cases of nullity. To my mind, it would be impracticable and unreasonable to say that a higher standard of proof was required in the case of nullity than in that of divorce.

That is, I think, borne out by what was said in *U.* (falsely called *J.*) v. *J.* (2), decided in 1867 by Lord Penzance. The head note is: "In a suit by a wife for nullity, on the ground "of the husband's impotence, the only evidence of the alleged "impotence was that of the petitioner, which was contradicted "by the respondent. The evidence of the medical witnesses "and the report of the inspectors was not inconsistent with "either case. The court declined to grant a decree on the "unsupported testimony of the petitioner."

On the general question of the kind of corroboration required, Lord Penzance said (3): "To pronounce a marriage invalid "on the unsupported oath of the party who seeks to be relieved "from its obligations is a serious matter, within the province "of the court, no doubt, but only to be done when the last "trace of reasonable doubt as to the truth and bona fides "of the case has been removed. If there be a direct conflict "of testimony between the two parties who alone know the

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(1) 1 Sw. & Tr. 362.

(2) (1867) L. R., 1 P. & M. 460.

(3) Ibid. 461.

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"truth, as in this case, the difficulties are much increased."

It is clear from that judgment that corroboration is not required: it is not even required when the respondent denies the allegations of the petitioner; but, of course, the matter must be examined with the greatest care.

That judgment was referred to with approval by Lord Birkenhead in *C.* (otherwise *H.*) v. *C.* (1), which is interesting because it established that a man may be impotent as regards one woman, although he may not be impotent as regards another.

Lord Birkenhead at the beginning of his judgment said (2): "The petitioner must remove all reasonable doubt, for she "has undertaken the burden of proof, and it is important "in such a case that she should be compelled to discharge "the burden, for the charge made, though physical and not "moral, is nevertheless a grave and wounding imputation that "the respondent is lacking, at least quoad hanc, in the power of "reproducing his species, a power which is commonly and rightly "considered to be the most characteristic quality of manhood." I cite that to reinforce what I said before, that it seems to me unlikely that a young man would come to the court and admit his impotence unless there were some truth in it. It is not suggested the husband wanted to get rid of his wife or to marry somebody else. The fact that he has come to the court and admitted his impotence does seem to me to be worthy of some consideration in deciding whether his evidence is true or not.

The question for the court is one of very great difficulty, and I am not at all clear in my own mind about it; but it seems to me that the husband has not obtained from the court below what he is entitled to receive if his evidence is believed, namely, a decree. The judge was entitled to say that he disbelieved the husband's evidence and to proceed to give reasons. He has done neither of those things. He has not said that he disbelieved the husband's evidence. He simply says that he is not satisfied. If he did not disbelieve the husband, then he ought to have been satisfied. That being so, I think that justice requires that there should be a new trial before another judge, where these matters can be gone into more fully and some further evidence, perhaps, can be called to substantiate what the husband has said. In my view, the appeal should be allowed and a new trial ordered.

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(1) [1921] P. 399, 403. (2) Ibid, 400.

SINGLETON L.J. I am of the same opinion. I will refer first to the law, though my Lord has discussed the authorities. In *C.* (otherwise *H.*) v. *C.* (1), Lord Birkenhead, sitting as a judge in the Probate, Divorce and Admiralty Division said (1): "Doubts were formerly entertained whether an "averment that a respondent is impotent quoad hanc is "valid to support a decree of nullity. Both before and after "the Council of Trent, the doctrine of the Church admitted "and indeed enjoined, nullity on such a ground." Later, in his judgment Lord Birkenhead cited the passage which my Lord has read from *U.* (falsely called *J.*) v. *J.* (2). I think it a matter for regret that in the report of Lord Birkenhead's judgment in the Law Reports (3), and also in the report in 37 T. L. R. 759, a few words of Lord Penzance are left out from the citation. The citation begins: "To pronounce a "marriage invalid on the unsupported oath of the party "who seeks to be relieved from its obligations is a serious "matter" . . . . The words which should have followed are "within the province of the court no doubt."

That makes it clear, as my Lord has pointed out, that Lord Penzance, in the year 1867, regarded corroboration as not necessary in a case of this nature. I feel sure that, if Lord Birkenhead in 1921 had thought that that was wrong when he made this citation, he would have said so. Therefore, I think it right to say that in a case of this nature corroboration is not essential.

At the same time, every court looks for corroboration. If there be no corroboration—and for myself I regard this as a case where substantially there is none—then the judge will exercise even greater care than he normally does to make sure that the case is proved before granting the relief which is prayed.

I would also refer to *Harthan* v. *Harthan* (4), where it was decided that: "Provided that there are no circumstances "which bar him or her, e.g. knowledge of the defect at the "date of the marriage, an impotent spouse is entitled to "petition for a decree of nullity, and the right to do so is not "conditional on the repudiation of the marriage by the other "spouse."

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(1) [1921] P. 400.
(2) L. R. 1 P. & M. 460.
(3) [1921] P. 403.
(4) [1948] W. N. 364; [1949] P. 115.

In the present case the impotent spouse, or the spouse who deposed to the fact that he was impotent, claimed a decree of nullity on that ground. It was said by the commissioner that it was a peculiar thing that he had not discussed his condition, when he found it out, with his father or with his friends. For myself, I should have thought it a most difficult thing for a man to discuss with his father, and perhaps difficult also to discuss with his friends, though it may be that some people might not find the same difficulty as would others. Certainly I should think that it is one of the last things that a man would like to depose to in the witness box. I find it difficult indeed to think that any man would wish to depose to his impotence as this husband did. It is difficult to think of any man inventing evidence of that kind about himself for almost any purpose. The commissioner seems to be satisfied that the husband was a man worthy of credence. I think that he accepted him at least as a man of honesty. But at the end of his judgment he said : " I am not satisfied " that this man is impotent and I refuse this decree."

I agree with my Lord that it is a little difficult to ascertain precisely what the commissioner did find. A jury returns a verdict one way or the other. Juries are not always asked to answer questions. If a judge determines a case by giving a judgment on the facts and on the law, I believe that the parties to the cause are entitled to know what the judge, or the commissioner, finds. Unless they do, there is bound to be dissatisfaction.

Only one party was taking part in this suit, though, of course, the wife had been served. The result, as I see it, is that the husband cannot know precisely what the commissioner has found. I do not say that by way of criticism of the commissioner ; but I for myself am not quite sure what he meant. If he believed the husband's evidence, and if he realized that corroboration was not necessary, he could properly have granted a decree of nullity. Indeed, I think that he ought to have done so if he accepted that as the position. I say that because I find it impossible, or almost impossible, to understand that any husband would give this evidence about himself unless it were true. On the other hand, if the commissioner did not believe the husband, I think that he ought to have said so, so that the husband would know where he stood, and the wife too.

I agree that it would not be right for this court, an appellate tribunal, to put itself in the place of the commissioner and to say, notwithstanding these words at the end of his judgment, that there must be a decree. The court has power, under Or. 58, r. 5, to order a new trial, and I believe that to be the right course here for two reasons: first, so that the husband and wife may ascertain just what has been found in this case; and secondly so that, if it be necessary, the husband in the suit may have an opportunity of calling further evidence. I think that he is entitled to that opportunity, even if he closed his case beforehand, because it is uncertain upon this judgment what the finding is. I agree that the appeal should be allowed and a new trial ordered.

HODSON J. In so far as the commissioner has founded himself upon absence of corroboration, which is not clear, I would respectfully disagree with him, because I think that there is some corroboration of the husband's physical condition in the evidence given by the doctor who was called. But the matter cannot be left there, and I think it desirable that this court should make it clear that corroboration is in practice required by the court, unless the absence of corroborative evidence can be satisfactorily accounted for, in this class of case. I have used the words which appear in Rayden on Divorce (5th ed.), p. 87, in connexion with cruelty, and I think that the position is exactly the same with regard to nullity.

It is quite true, as Singleton L.J. has pointed out, that it is not easy to get corroboration, particularly where a man is the petitioner and the suit is undefended, in a case of this kind. Possibly many cases are heard where there is no corroboration, but the court in practice requires it if it is available. That seems to me important having regard to the peculiar nature of the jurisdiction exercised by the court, in that so often there is no contest and only witnesses from one side are produced.

Assuming that there is no corroboration in this case, I agree that, although the 105th canon laid down that corroboration was required by the ecclesiastical courts, it does not appear that that rule has been made part of the law of England. I have in mind what Sir Matthew Hale said in his History of the Common Law, in the passage quoted by Tindal C.J., in *Reg.* v. *Millis* (1): " ' The rule by which they proceed is the canon

(1) (1844) 10 Cl. & Fin. 534, 680.

" 'law, but not in its full latitude, and only so far as it stands " 'uncorrected either by contrary Acts of Parliament or the " 'common law and custom of England ; for there are divers " 'canons made in ancient times, and decretals of the Popes, " 'that never were admitted here in England.' "

The cases already referred to show clearly that this court has acted in the past on independent evidence, apparently in direct contravention of the 105th canon, and I do not wish to be taken as saying that corroboration is necessary in law.

On the findings of the commissioner, I share the difficulty which my Lords have felt in appreciating why at the conclusion of his judgment he said : " I am not satisfied that this " man is impotent." He had previously said in effect that he was not guilty of perjury, which must have meant that he was not wilfully lying. If not, what was he doing ? It could not have been a case of want of recollection. It could hardly have been a case of a man's giving evidence out of his own imagination. If the commissioner had thought so, he would no doubt have said so. Therefore, for my part, I am unable to understand why, having said in effect that the husband was a truthful man, he came to the conclusion that he was not satisfied that he was impotent. I agree that there must be a new trial ; and it will be open to the husband at the further hearing to take steps to produce the evidence, if it is available, either of live witnesses or of documents, to support his case, other than the rather slender medical evidence which he has already been able to call.

Appeal allowed. New trial before another judge ordered.

Solicitors : *Churchill, Clapham & Co., for A. E. H. Sevier, Derby.*

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1950
Mar. 23.

Bucknill and Denning L.JJ. and Hodson J.

Divorce—Desertion—Wife's petition—Service out of the jurisdiction of registered letter—All reasonable steps taken to notify respondent of petition—Inference to be drawn from non-return of registered letter—Discretion of court—Matrimonial Causes Rules, 1947, *St. R. & O.* 1947, *No.* 523 *L*/9 *rr.* 8 *and* 10.

Where it is satisfied, beyond reasonable doubt, that all possible steps have been taken to notify a respondent, who is out of the jurisdiction, of a petition, and that the probabilities are that he has received the petition and he has simply declined or omitted to send an acknowledgment of the service, as required by r. 8 (2.) of the Matrimonial Causes Rules, 1947, the court has discretion under r. 10 to dispense with further service and direct that the petition should proceed to trial.

The Court of Appeal may interfere even when the appeal is from an order which is based on the judge's discretion, if satisfied that the judge was wrong. Statement of Lord Wright in *Evans* v. *Bartlam* [1937] A.C. 473, 486, applied.

Appeal from Willmer J.

On December 11, 1944, the petitioner, Margaret Elizabeth Hesp, then in her 21st year, born of English parents, and an English citizen, married in England Willie Heath, the respondent, an American soldier serving in this country. In March, 1945, she gave birth to a son, of whom Heath was the father. In July, 1945, the husband went back to America and was demobilized there in the following October. From that date he had never contributed anything towards the support of his wife or son. From time to time he wrote letters to his wife from Sikeston, Missouri, giving as his home address, 405 Fletcher Street, Sikeston. The wife wrote to him at that address, and he presumably received her letters, as they were not returned by the postal authorities. According to the wife's affidavit she from time to time pressed her husband to allow her to join him in America, or that he should rejoin her in England. He did neither, and in the last letter she received from him, dated February 26, 1947, he suggested that she should petition for divorce, in which event, he promised, he would sign and return the papers if she sent them to him, and also pay the costs of the proceedings.

On March 15, 1949, the wife, having received no further communication from her husband, filed a petition for divorce on the ground of his desertion, she being entitled to proceed in this country by virtue of s. 1 of the Matrimonial Causes

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(War Marriages) Act, 1944. On March 19, the solicitor acting for the wife, who was proceeding as a poor person, sent a letter by registered post to the husband, addressed to 405 Fletcher Street, Sikeston and enclosing a copy of the petition, a memorandum of appearance, and notice to appear, and a form of acknowledgment of service. No reply was received, and the letter, although registered, was not returned. A second letter having elicited no reply, the wife's solicitors obtained the assistance of a firm of lawyers at Sikeston, who were, however, unable to communicate with the husband, he having left 405 Fletcher Street. They reported, however, that letters sent to the husband had apparently been forwarded to him by the post office. In those circumstances the wife applied to Willmer J., for leave to proceed with the petition without further proof of service. The judge felt unable to grant the application, but he gave leave for the present appeal against his decision.

C. Trevor Reeve for the wife. It is submitted that all reasonable steps have been taken to notify the husband of the petition. The only other step that can be suggested is by advertisement in local newspapers. It is clear that the husband wished for a divorce, and if the registered and other letters have failed to obtain any acknowledgment it is unlikely that an advertisement would have any better result. The cost of advertising, which would be considerable, would place an unfair burden on the innocent wife. The court has discretionary power to dispense with further proof of service, and, where the judge below has wrongly exercised his discretion, the Court of Appeal will interfere.

BUCKNILL L.J. This appeal raises an interesting and important question in the divorce jurisdiction. [His Lordship stated the facts, read the material provisions of rr. 8 and 10 of the Matrimonial Causes Rules, 1947 (1), and continued :]

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(1) Matrimonial Causes Rules, 1947, rule 8 (1.): "Unless "otherwise directed—(*a*) a copy "of every petition shall be served "personally or by registered post "upon every respondent . . . . "(2.) For the purposes of the "foregoing paragraph of this "rule a document shall be deemed "to have been duly served by "registered post if the document "is sent by prepaid registered "post to the party to be served, "and an acknowledgment of service in accordance with Form 4 "of his identity and of his receipt "of the document is signed by "him and returned to the solicitor

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I think that the facts establish beyond any reasonable doubt that this petition, which was sent in March, 1949, to the husband by registered post, and has never been returned to the sender, was in fact received by him. That being so, what more ought to be done? It is not a proper service, because under r. 8 he ought to sign an acknowledgment of service; but it is a case where the judge, under r. 10, can direct that the petition shall proceed on the ground that he is satisfied that the petition has in fact been received. The only suggestion now made is that an advertisement should be put in the local Sikeston newspaper, which would cost about 7*l*. I ask myself what use would that be? Is it any more likely to be seen by the husband than that he received the registered letter sent to him at the address where he had been living? I see no reason to suppose that that would be more likely. I think that it would impose a great hardship on the wife to insist on advertisement in this case.

Certainly in divorce causes it is highly important that the respondent should be fully informed of the proceedings which are being taken against him; but there is another point of view and that is the point of view of the petitioner, the wife. Here is a woman who has had a baby by this man three months after the marriage, has been deserted by him, and has had no maintenance from him for four years. She has done everything she can through the Poor Persons Committee to have him served with the petition, but he does not answer letters. He was quite ready to be divorced; apparently he wants it. Yet it is suggested that this further expense ought to be incurred before the case can proceed. I am far from saying that advertisements are not useful in notifying parties in such a case as this. In cases of this kind, where costs are being asked for, the fact that the respondent does not reply to the advertisement is no evidence that he did not see it; advertisements are put in the newspapers but

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"for the petitioner, or to the "petitioner . . . ."

Rule 10: "Unless otherwise "directed . . . . a petition shall "not proceed to trial or hearing "unless the respondent . . . . "(*a*) has entered an appearance, "or (*b*) is shown by affidavit in "accordance with Form 11 (which "shall be filed) to have been "served with the petition personally or in accordance with "an order for substituted service. "or (*c*) has returned to the "solicitor for the petitioner, or "to the petitioner if he is acting "in person, an acknowledgment "of service in accordance with "Form 4."

it is not known what happens afterwards. I think that everything that could reasonably be done to effect service here has been done.

There is one other point about which I ought to say a word. This is an appeal from an order which is based on the judge's discretion. If I thought that this was merely a matter of discretion, I would not interfere with the decision of the judge. Willmer J. gave leave to appeal, and I therefore assume that he considered that the case raised some point of principle apart from the special facts of the case. It is difficult, however, to lay down any principle in a case of this kind, except the principles which I have tried to indicate. One is that all reasonable steps should be taken to see that the respondent has knowledge of the proceedings. The other is that an unreasonable burden should not be put on an innocent petitioner like this wife before she is able to be released from a marriage, which is no marriage now except in its legal aspects, and from a man who has deserted her and her child as this husband has done.

I therefore think that this is a case in which we may properly allow the appeal.

DENNING L.J. It is very important that everything that is reasonable should be done to bring the petition to the notice of the respondent. At one time there had to be personal service on him. Now service by registered post is permitted, but it is only effective if the acknowledgment of service is signed by the respondent. It does, however, often happen that the respondents do not sign or return the acknowledgment. When that happens, it does not necessarily mean that the wife has to go to the expense of personal service or advertisement. If the probabilities are that the respondent has received the petition and simply declined or omitted to sign the acknowledgment, then the court can dispense with further service. That is a course which I have repeatedly taken when sitting in chambers in the Divorce Division. On the facts of the present case I should unhesitatingly have dispensed with further service.

The only remaining question is whether this court should interfere with what is primarily a matter for the discretion of the judge. On this topic I would refer to what Lord Wright said in *Evans* v. *Bartlam* (1). If this court is satisfied that the judge below was wrong then it can interfere. Lord Wright said: "The court must if necessary examine anew the relevant "facts and circumstances in order to exercise a discretion by "way of review which may reverse or vary the order. Other-"wise in interlocutory matters the judge might be regarded "as independent of supervision." In this case the judge had considerable doubt, because he gave leave to appeal. I am clearly satisfied that he was wrong and that the appeal should be allowed.

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(1) [1937] A. C. 473, 486.

HODSON J. In form this was a summons by the petitioner for leave to proceed without service of the petition on the respondent, and, in form also, the judge made an order that the petitioner's application for leave to proceed in that way was refused. In her affidavit in support of the summons the wife made it plain what she was really seeking to do, namely, to obtain an order to proceed without further service of the petition.

It is necessary to consider the effect of the relevant rules, rr. 8 and 10 of the Matrimonial Causes Rules, 1947. Rule 8 (1) (*a*) states, "a copy of every petition shall be served personally "or by registered post upon every respondent," and the side-note describes that rule as concerning "Service of petition," and other documents. Paragraph (2) of the rule has to do not with the necessity for service in itself but with the proof of service. Rule 8 (2) really concerns the proof of what has been done. But what has to be done still remains the same thing: the copy of the petition has to be served either personally or by registered post.

Rule 10, which concerns specifically proof of service, as the side-note indicates, begins with the words, "Unless otherwise "directed." Those words confer a discretion on the court to direct that, even though the particular formalities indicated in r. 10 have not been complied with, yet the court can draw the proper inference, namely, that in a given set of circumstances the petition has actually been served.

The facts have already been stated by my Lord, and in my judgment the right inference to draw from those facts is that this petition was brought to the attention of the respondent by being sent to him by registered post in the manner which the rules provide. For my part I think that the judge did not attach the right weight to the fact that the document had been sent and that the correspondence which followed between the

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attorneys in America and the solicitors in England supported the inference that it had reached him. If he did not in our opinion lend sufficient weight to that consideration, I think that a justification for interfering with the exercise of his discretion under r. 10.

I agree that the appeal should be allowed.

Appeal allowed. Direction that petition to proceed without further proof of service.

Solicitors: *A. M. V. Panton, The Law Society, Services Divorce Department.*

A. W. G.

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Feb. 7, 8, 9 *and* 27.
Bucknill, Singleton and Denning L.JJ.

TRESTAIN *v.* TRESTAIN.

Divorce—Maintenance—Husband guilty of adultery—Decree against wife for cruelty—Conduct of wife much less blameworthy than that of husband—Right to maintenance—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 190, *sub-s.* 1.

Per Singleton L.J. Where a husband obtains a decree for the dissolution of his marriage, but the evidence shows that he is the spouse responsible for the break-up of the marriage, there is no bar to the wife's obtaining an award of maintenance.

Per Denning L.J. The fact that a husband has obtained a decree for dissolution of his marriage is in no way a bar to his wife's claiming and obtaining maintenance, since that fact does not necessarily give a true picture of the conduct of the spouses. The wife may also be in a position to obtain a decree and, if so, she ought not to be in any worse position if she does not petition or, having filed her petition, abandons it.

There is nothing in the relevant statutes which enacts that a wife against whom a decree has been made cannot be awarded maintenance, but the court, in awarding maintenance, must have regard to the conduct of "the parties": s. 190, sub-s. 1, of the Supreme Court of Judicature (Consolidation) Act, 1925. If, on an investigation of the facts, it appears that the conduct of the wife has been much less blameworthy than that of the husband, then, even though a decree has been pronounced against her and none in her favour, she is entitled to claim maintenance as if a decree had also been pronounced in her favour. The judge who tries a petition for divorce should express his views on the conduct of the spouses to assist those whose duty it is to award maintenance.

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APPEAL from Mr. Commissioner Grazebrook K.C., sitting at Bristol Assizes.

The husband, respondent to this appeal, sought a decree nisi on the ground of his wife's, the appellant's, cruelty. In 1948 the wife had petitioned for divorce, the husband putting in no answer and making no counter-charge. The case was put into the list for hearing, when the wife decided not to pursue it. The husband then brought this petition on the ground of cruelty. He set out a long list of particulars of cruelty covering ten years of married life; they were mostly accusations of making unfounded charges against him, accusations of nagging and the like. He alleged an assault by his wife on him at a prisoner-of-war camp at Goathurst, near Bridgwater, Somerset, in January, 1948, when "the "respondent struck the petitioner with her umbrella, threw "a heavy earthenware jar at him, kicked him and threw a "bottle of red ink over him." This assault occurred immediately after the wife had gone to the husband's quarters in camp and had found there a letter which disclosed to her that her husband had committed adultery. According to the evidence the umbrella was broken on his shoulder, and a flower vase was thrown at him, but did not hit him. The bottle of ink was thrown, but "it may have just hit my "forehead." There was no evidence as to any kicking. The husband when asked what injury he had suffered, replied: "I managed to side-step, so practically, apart from a small "bruise on my shoulder, nothing at all." He said that his wife was struggling and that he pushed her into a very soft armchair. The commissioner granted the husband a decree nisi, exercising his discretion in the husband's favour in respect of his adultery. The wife appealed.

The wife appeared in person.
Moylan for the husband.

Cur. adv. vult.

Feb. 27. BUCKNILL L.J. read a judgment in favour of dismissing the appeal on the ground that there was evidence, consisting for the most part of the making of unfounded charges against him, which the commissioner could find the wife guilty of cruelty entitling him to a decree.

SINGLETON L.J., reading his judgment, stated the facts,

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and continued: I do not think that the assault by the wife of itself ought to be regarded as cruelty. The wife had gone to the husband's quarters in camp and had found a letter which disclosed to her that her husband had committed adultery. She was extremely annoyed, and waited until he returned about 11.30 p.m. Provoked as she was, she resorted to violence of a kind which really did not do any harm to him. I do not see that one can blame her; certainly her conduct ought not to be regarded as cruelty without consideration of the provocation involved. It seems to me that this case must stand or fall on the other allegations, which, if satisfactorily proved, and if accompanied by injury, or reasonable anticipation of injury, to the health of the petitioner, may fall within the kind of cruelty found by Willmer J. in *Usmar* v. *Usmar* (1). The difficulty is to ascertain just what the commissioner has found. It is most desirable that in a case involving cruelty the findings should be clearly stated. The commissioner states that he accepts the petitioner's evidence wherever it is in conflict with that given by the wife, so I suppose one must assume that he found that all the charges made in the evidence of the petitioner were true and that he found there was a course of conduct which amounted to cruelty on the part of the wife, even though the petitioner never thought of it as cruelty. The petitioner was asked: "When did you first consider that "your wife had treated you with cruelty?", and he answered: "I suppose really when she came to Bridgwater and assaulted "me. I suppose that was the first time it occurred to me." He added that it had never occurred to him until that time.

No one can take a favourable view of a wife who goes to her husband's room in camp and searches his belongings, who makes charges such as this wife did, and who writes letters such as she wrote. The husband was a regular soldier who was commissioned during the war. The evidence of injury to his health is very slight; it is not supported by any medical evidence. The husband said that he was passed as fit every time he was medically examined. He was not living with his wife—they had not lived as man and wife since early in 1946, though they had lived in the same house on one or two occasions. Still, it cannot be said that there was no evidence on which the commissioner could find as he did; and, moreover, he is the best judge of the value of that evidence.

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(1) (1948) 64 T. L. R. 500.

While agreeing that the appeal should be dismissed, I think it right to place on record three matters in which I do not agree with the findings of the commissioner: 1. I do not consider that it was right to say "there can be said to be "reasonable apprehension of further violence." The only occasion on which there was any act of violence by the wife was when she discovered that her husband had been guilty of adultery; there was no repetition of it on a subsequent meeting. 2. I believe that the husband was responsible for the break-up of this marriage. The letters of April, 1946, show that they were on good terms until that time. His failure to come back from Germany after she had had a serious operation, though he could have obtained leave, led her to take a view which resulted in estrangement, and early in 1948 she found out about his adultery. 3. I am not satisfied that she conduced to that adultery.

Mr. Moylan told the court that a probable result of the decree was that the wife would not be entitled to maintenance even if she should be in need of it. This would seem to me to be a strange position—and I cannot think that it is right—if the husband is, as I have said, the one responsible for the break-up of the marriage.

DENNING L.J. read the following judgment. It is common knowledge that, when parties are divorced, you cannot really tell which of the two was to blame merely by asking which of them obtained the decree. This case is a good illustration of this truth. The wife could in 1948, if she had so chosen, have divorced her husband for his adultery. She had an unanswerable case and launched a petition to which the husband put in no answer and made no counter-charge. The case was actually in the list for hearing when the wife herself decided not to go on with it. After all, she was not bound to divorce her husband if she did not want to. This stung the husband into activity. He raked through the whole of the married life, set down all the occasions he could remember on which his wife had spoken or written in anger to him, and charged her words as cruelty. Many of them were nothing of the kind. They were either provoked by the husband himself or did not cause the least injury to his health. But one or two occasions are perhaps capable of being held

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to be cruelty, and, as the commissioner has so found, we cannot interfere. So the husband gets the divorce. On the face of the records of this court, he appears as the innocent party and the wife as the guilty one. True enough, he had to ask for the court's discretion, but it was exercised in his favour.

I desire to say emphatically that the fact that the husband has obtained this decree does not give a true picture of the conduct of the parties. I agree that the marriage has irretrievably broken down and that it is better dissolved. So let it be dissolved. But when it comes to maintenance, or any of the other ancillary questions which follow on divorce, then let the truth be seen. If this wife had herself sought a divorce, she would in all probability have been granted one. She could, for instance, have got it by going on with her original petition; or, if she had put in a cross-prayer for divorce in these proceedings, she would probably have been granted it, at any rate in this court, even if the husband had also been granted a divorce on his petition. She ought not to be in any worse position simply because she does not wish herself to ask for a divorce. The truth is that the husband has been guilty of the grave matrimonial offence of adultery with, be it noted, a girl twenty years his junior; whereas the most that the wife has been guilty of is abusive and scandalous words and one trifling blow, all done at a time when she had a good deal to put up with from him.

These being the facts, does the form of decree bind the court? Does it mean that the judges and registrars who have to deal with maintenance must regard the wife as the guilty party entitled to nothing? And that all she can do is to throw herself on the mercy of the court and beg for a compassionate allowance? I say, No: it does not mean that. There is nothing in the statute which says that a wife against whom a decree has been made cannot be awarded maintenance, and there is nothing in it about discretion being exercised "in favour of" one side or the other, or about a "compassionate allowance." All it says is that on a decree of divorce the court may award maintenance to the wife; and ever since 1902 it has been settled that this includes a wife against whom a decree has been made; and she is not bound to show special circumstances: *Ashcroft* v. *Ashcroft and Roberts* (1). The court has, of course, to have regard

(1) [1902] P. 270.

to "the conduct of the parties." But the form of the decree is not conclusive upon that. If, upon an investigation of the facts, it appears, as it does in this case, that the conduct of the wife has been much less blameworthy than that of the husband, then, even though a decree has been pronounced against her, she is entitled to ask for maintenance as fully as if a decree had been pronounced in her favour, or at least as if it had been pronounced in favour of both parties.

I wish that questions of maintenance could be dealt with by the judges who try these cases; but, no matter on whose petition they grant the divorce, they can at least—and they should, in my opinion—express their views on the conduct of the parties so as to assist those who have to deal with maintenance.

In the recent case of *Sydenham* v. *Sydenham* (1), this court was able to see that justice was done by granting a decree to both parties. In so doing, we followed the suggestion of Viscount Simon in *Blunt* v. *Blunt* (2). There have been other unreported cases in this court on the same lines. In the present case we cannot take that course because the wife did not herself ask for a decree in her own favour. But we have, I trust, made it clear that she is not to suffer on that account. The fact that it is the husband who has obtained a decree is in no way a bar to her claiming and obtaining maintenance. The registrar or judge who has to deal with maintenance will take notice of what has been said in this court about the conduct of the parties; and thus the same effect will be achieved as if we had actually pronounced a decree in her favour.

The appeal has, I think, been justified, inasmuch as this court has taken a very different view of the comparative blameworthiness of the parties from that of the commissioner; but, in so far as the question of divorce or no divorce is concerned, this court does not interfere and the appeal itself is therefore dismissed.

Appeal dismissed.

Solicitors: *Reed and Reed.*

(1) (1949) 65 T. L. R. 489. (2) [1943] A. C. 517, 531.

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Shipping—Collision between French and British vessels—France occupied by enemy—Legal proceedings after hostilities—British vessel held alone to blame—Damages—Date from which interest awardable.

On November 2, 1940, a French fishing vessel laden with a cargo of cod fish came into collision with an English steamship, and was sunk with her cargo and her crew's personal effects. At that time the whole of France had been declared to be enemy territory, and consequently both the owners and crew of the French ship had the status of alien enemies and could therefore bring no proceedings in the English courts; nor could the owners of the English ship legally take any steps to admit liability and pay compensation for the loss occasioned by the collision. This state of affairs continued until the liberation of France which for the purposes of the case was taken to have been accomplished on October 13, 1944, the date of the recognition of the Government of General de Gaulle. In proceedings brought thereafter by the owners and crew of the French ship, the English ship was held to be alone to blame. On the reference to assess the damages the registrar disallowed interest on the amounts awarded as from November 2, 1940, to October 13, 1944, on the ground that during that period the payment of interest was not only suspended but cancelled and that he therefore had no discretion to award interest, adding that if he had had a discretion he would have exercised it by not awarding interest during that period.

On motion in objection to the registrar's report:

Held, that, as the true principle underlying the award of interest in Admiralty was that, in every pound's worth of damage in respect of which interest was ultimately awarded, the interest accrued potentially from the moment when the damage was suffered until the liability was adjudged and the amount finally ascertained, the plaintiffs were entitled to interest from the date of the collision until the date of the registrar's award.

Hugh Stevenson & Sons Ld. v. *Aktiengesellschaft für Cartonnagen-Industrie* [1918] A. C. 239, applied.

Du Belloix v. *Waterpark* (*Lord*) (1822) 1 Dow. & Ry. 16, and *Wolff* v. *Oxholm* (1817) 6 M. & S. 92, considered.

MOTION in objection to a registrar's report dated July 28, 1949.

The claims in the reference were by the owners of the French sailing and fishing vessel *Anne de Bretagne* (her crew and one passenger suing for their lost effects) against the owners of the British steamship *Berwickshire*, and arose out of a collision which occurred in the North Atlantic Ocean on November 2, 1940, as a result of which the *Anne de Bretagne*, with her full cargo of codfish, sank. At that time the whole of France had been declared to be enemy territory, so that the French owners and crew of the *Anne de Bretagne* had become enemy aliens and it was impossible for them to take proceedings. Equally it was impossible for the owners of the *Berwickshire* to admit liability and pay compensation for the loss of the *Anne de Bretagne*, since any such payment would not merely have been contrary to the common law of England, but in direct contravention of the Trading with the Enemy Act, 1939. The action was eventually heard on July 29, 1947, when the *Berwickshire* was held to be alone to blame for the collision.

In the reference to assess damages the registrar awarded 7,500*l.* in respect of the vessel *Anne de Bretagne* and 699*l.* 10*s.* for the crew's effects. He awarded 4,000*l.* for the cargo of codfish, which was later increased by agreement between the parties to 9,600*l.*, the President making an order varying the registrar's award in that respect. The registrar awarded interest, not from the date of the collision and loss, but only from October 13, 1944, that being the date of recognition of the French Provisional Government of General de Gaulle.

The owners of the *Anne de Bretagne* appealed against the decision of the registrar on the question of interest.

Carpmael K.C. and *Vere Hunt*, for the plaintiffs. The registrar disallowed interest for the four years that France was occupied by the enemy, and the plaintiffs contend that he should not have done so. They claim interest as from the time of loss. Interest should be awarded as part of the damages. If the defendants had difficulty in making payment direct to the plaintiffs, they could have paid whatever they thought fit to the custodian of enemy property. In any event, it was a matter in which the registrar had complete discretion. The Maritime Conventions Act, 1911, was to be considered.

[LORD MERRIMAN P. How do you distinguish the present case from *Ledeboter* v. *Hibbert* (1) in the light of the observations of Morris J. (2) ?]

In that case Morris J. went too far, but in any event there is a legal distinction between liabilities in respect of interest arising out of torts and those arising out of contract, e.g. bills of exchange : see McNair on The Legal Effects of War (3rd ed.), p. 105. The effect of the Limitation Act, 1945, is sufficient to distinguish the present case from any case under bill-of-exchange law. The claim by the French owners subsisted. They had a maritime lien which attached at the moment of collision, and that had been pronounced for in the plaintiff's favour by the judgment of this court. The usual result ought therefore to follow.

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(1) [1947] K. B. 964. (2) Ibid. 966.

[LORD MERRIMAN P. I understand you to say that from time immemorial it has been the custom to attach interest to damages on a collision claim; that that is part of the law of the sea inherited by the Admiralty Court; that it did not depend on any statute in the first instance, but is now crystallised in an Act of Parliament which has swept up a variety of matters including claims for damage.]

The Maritime Conventions Act, 1911, and the Limitation Act, 1945, exclude the principles applicable in bill-of-exchange cases. [*Cooper* v. *Cooper* (1), *Evans* v. *Bartlam* (2), *Hugh Stevenson & Sons, Ld.* v. *Aktiengesellschaft für Cartonnagen-Industrie* (3), *Donald Campbell & Co.* v. *Pollak* (4), and *The Joannis Vatis* (*No.* 2) (5) referred to.]

Naisby K.C. and *Boyes* for the defendants. The award of interest, as part of the damages in this collision, is a matter of discretion and not one of law. The cases that have been cited (including the bill-of-exchange cases) contain nothing to affect that principle. Cases arising in actions in tort and in actions in contract must be distinguished. The discretion is to be judicially exercised and in accordance with the general principles of law applicable to similar cases. The normal course is to award interest on the amount of damages from the date of collision. The registrar properly allowed interest from a certain date.

[LORD MERRIMAN P. But this present objection, more or less of principle, excludes the whole war period.]

The discretion remains as to the award of interest. Where money becomes payable during the war it is illegal to pay the enemy, and where money becomes due during that period by reason of something which happens during that period no interest is recoverable. Where money would become payable upon an event which has happened during the war, but was unpayable by prohibition, then no interest has been allowed (according to the authorities) while the period of illegality of payment persisted.

(1) [1936] W. N. 205.
(2) [1937] A. C. 473.
(3) [1918] A. C. 239.
(4) [1927] A. C. 732.
(5) [1922] P. 213.

The exercise of the registrar's discretion in the present case was in the nature of a considered judgment, and as such should be upheld. [Counsel cited *The Crispin* (1).]

[LORD MERRIMAN P. Your contention is that no interest would be allowed when the debt or damages became payable in respect of the period of suspension by force majeure.]

A distinction should be observed between the bill-of-exchange cases where the debt becomes payable before payment becomes illegal, and those cases when the debt is illegal at the time when it becomes payable. There appears to be no case in which this distinction has been drawn. [*The Kong Magnus* (2) and *The Joannis Vatis* (*No.* 2) (3), referred to.]

Carpmael K.C., in reply.

Cur. adv. vult.

Feb. 15. LORD MERRIMAN P. reading his judgment, stated the facts, and continued. The real dispute in this case is whether or no interest should be allowed for the period from the date of the casualty to October 13, 1944. It raises an interesting and important question on which there is no direct authority. The registrar, in a carefully considered judgment, while acknowledging that it has always been recognized in Admiralty that interest is paid on damages, and that, since the Law Reform (Miscellaneous Provisions) Act, 1934, this principle is applied to all courts, including the Admiralty Court, held that it did not follow that, where the one party is prohibited by law from having any commercial dealings with the other party, the first party should necessarily pay interest for the period during which he had been prohibited from paying. He then considered the suggestion that payment could have been made to the Custodian of Enemy Property. As to this, the registrar was clearly right in rejecting the contention, and it was not pressed before me. Finally, after referring to the circumstances in which the plaintiffs became enemies of Britain and so remained until the liberation of France, he states his conclusions in these words: " During that period all commercial intercourse " between British nationals and enemy aliens was prohibited, " whether by common law or by the Trading with the Enemy " Act. The effect of this prohibition was, in my opinion " not merely to suspend but to cancel the payment of interest

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(1) (1929) 34 Ll. L. Rep. 400; 35 Ll. L. Rep. 197.

(2) [1891] P. 223.

(3) [1922] P. 213.

"as between British nationals and enemy aliens, and to "deprive me of discretion in the matter. Accordingly, I made "no award of interest from the date of the collision until the "date of liberation. If it had been a matter of discretion "I should have reached the same result and should have "allowed no interest to run between the collision and the "liberation. The liberation of France I date from the recognition by Britain of the de Gaulle Government on October 13, "1944."

It will be seen, therefore, that the registrar has determined this question on the ground that he is obliged, as a matter of law, to reject a claim for interest for this period, rather than as a matter for the exercise of the discretion entrusted to him by s. 3 of the Law Reform (Miscellaneous Provisions) Act, 1934. Unless I am driven to the same conclusion of law as that held by the registrar, I also have a discretion, under s. 3, sub-s. 1 of that Act, whether to award any interest at all, and, if so, at what rate, on what part of the damages, and whether for the whole or any part of the period between the collision and the judgment. It is quite clear from the approval of the decision in the Court of Appeal in *Cooper* v. *Cooper* (1), expressed by Lord Atkin in the House of Lords in *Evans* v. *Bartlam* (2), that my discretion would not be fettered by any previous exercise of the registrar's discretion.

As I have already indicated, there can be no doubt that the principle of including in the damages for a collision, at the discretion of the judge, interest on the amount recovered, at a rate, for a period, and whether in respect of the whole or part of the amount recovered, all of which matters are also respectively at the discretion of the judge, was firmly embodied in the Admiralty jurisdiction at a time when the right to award interest by way of damages at common law depended, speaking generally, on the Statute 3 & 4, Wm. IV, c. 42, ss. 28 and 29, or on the express terms of a contract, or on those imported into mercantile contracts by the custom of merchants, as, for example, on bills of exchange or promissory notes: see the notes to the common indebitatus count for interest, in Bullen and Leake's Precedents of Pleadings (3rd ed.), pp. 51–52.

As to the Admiralty practice, it is unnecessary to multiply authorities. I need only refer to *The Hebe* (3), *The Gazelle* (4), per Dr. Lushington in each case; *The Kong Magnus* (1), per Sir Charles Butt; and *The Joannis Vatis* (*No.* 2) (2), per Sir Henry Duke P. There is also a very clear statement of the principle by Sir Robert Phillimore in *The Northumbria* (3).

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(1) [1936] W. N. 205.

(2) [1937] A. C. 473, 478.

(3) (1847) 5 Notes of Cases 176, 182.

(4) (1844) 2 Wm. Rob. 279, 281.

Distinguishing the authorities cited in support of the proposition that the right to award damages depended solely on the Statute 3 & 4 Wm. IV, c. 42, and the proposition that the Admiralty practice was erroneous as being at variance with the common law both before and since the passing of the statute, Sir Robert Phillimore said (3): " But it appears to me quite " a sufficient answer to these authorities to say, that the " Admiralty, in the exercise of an equitable jurisdiction, has " proceeded upon another and a different principle from that " on which the common law authorities appear to be founded. " The principle adopted by the Admiralty Court has been that " of the civil law, that interest was always due to the obligee " when payment was not made, ex mora of the obligor; and " that, whether the obligation arose ex contractu or ex delicto."

Discussing the period from which the interest is to be reckoned, Sir Robert Phillimore (4) pointed out that the court should be guided by the principle of restitutio in integrum, and he referred to the argument that the statutes limiting liability had adversely affected the established principles of the court as follows (5): " The question is, how are these " principles affected by the statutes which limit the liability " of the wrongdoer. In these statutes the legislature intro- " duced a new principle, the object of which was to give " some protection to the owner against the wrongdoing of his " servant, the master of the vessel. They preserved the " principle of restitutio in integrum in cases where, with his " actual fault and privity, the damage had been inflicted on " the sufferer; but with this exception, they limited his " liability to a certain definite sum. In the latter case, there- " fore, this limited amount took the place of the restitutio " in integrum; but the principle still remains that the liability " to this amount attaches from the time of the collision; and " there seems no reason why interest should not accrue on " the delay to pay that limited amount, as well as in the case " where the amount is unlimited. Indeed, the equity of the

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(1) [1891] P. 223, 226.
(2) [1922] P. 213, 223.
(3) (1869) L. R. 3 A. & E. 6, 10.
(4) Ibid. 11, 12.
(5) Ibid. 12.

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"thing is the other way, for to refuse this interest would be "to diminish still further the natural right of the sufferer "to full compensation for the injury which he has sustained. "It is to be observed that the sufferer does not, where interest "is awarded, obtain interest on the amount of his damage, "but on the limited amount, or on his share of the limited "amount to which the statute has restricted the liability "of the wrongdoer. In the case of a vessel without cargo "being sunk, it is clear that the interest would date from the "time when the liability attached, that is, from the moment "of the collision. Nor, when the case is examined, does it "appear that a different rule ought to apply when the vessel "carries cargo. Under the rule of restituto in integrum the "cargo-carrying vessel did not obtain interest from the date "of the collision, because she received it in the shape of "freight at the port of delivery; but where the amount of the "liability is limited, and the sufferer does not receive full "compensation, the reason which fixes the date of the probable "arrival at the port of delivery as the date from which interest "shall run does not apply."

On behalf of the British shipowners, Mr. Naisby admitted that there was no authority binding me to hold, in an Admiralty case, that interest could not be recovered in respect of a period during which the payment either of the principal debt or of the interest was prohibited by law. He invited me, therefore, to decide this question on the basis that the award of interest as part of the damages for this collision was a matter for my discretion and not one of law.

Not only have the researches of counsel, whose arguments were most thorough and helpful, failed to disclose an Admiralty case raising this question in connexion with the war of 1914–18 or the recent war, but Mr. Darby, whose knowledge of these matters during the period between the two wars, whether at the Bar or as Admiralty Registrar, is unrivalled, is strongly of opinion that there was no case arising out of the earlier war in which this question was litigated.

In inviting me to determine this as a matter of discretion, however, Mr. Naisby rightly emphasized that it must be a judicial exercise of discretion, and he urged on me the propriety of guiding and informing my discretion by considering the decisions of common-law judges in cases which were not widely dissimilar. In particular, he laid stress on two decisions under the Bills of Exchange Act, 1882, *Biedermann* v. *Allhausen & Co.* (1), which arose out of the war of 1914–18, and was decided by the late Lord Darling; and *Ledeboter* v. *Hibbert* (2), which was decided by Morris J. To these and other earlier cases decided by courts of common law in respect of damages for breach of contract I will shortly return.

Whatever the distinction may be worth, in this case I am concerned with the enhancement of the damages arising ex delicto on the established Admiralty practice, whereas all the cases by which I am invited to guide the exercise of my discretion are cases of damages for non-payment of a debt arising ex contractu. Moreover, the bill-of-exchange cases depend on the provisions of the Bills of Exchange Act, 1882, which, by the very terms of the Law Reform (Miscellaneous Provisions) Act, 1934, are expressly excluded from the operation of that Act.

Nevertheless, having special regard to the fact that the Bills of Exchange Act was intended to be a self-contained code declaratory of the common law, I might, in the absence of any other guidance, have felt myself impelled to follow the principle so clearly expressed by Morris J., in *Ledeboter* v. *Hibbert* (2), and to confirm the registrar in acting upon it. Morris J., said (3): " In the present case, although the " defendant did not perform his contractual obligation to " meet the bill at maturity, he could not lawfully have done " so. Apart from the position at common law, there was " express statutory provision which prohibited him from " paying the plaintiffs. In these circumstances, in my opinion, " he is not liable in damages for having failed to pay. He " was obliged not to pay. There seems to me to be something " incongruous in asking the court to award damages against " a man for failing to do what the law forbade him to do. " This, in my view, disposes of the claim which is made."

This is in accord with the decision of Darling J., in *Biedermann* v. *Allhausen & Co.* (4), where he said: " With " regard to interest, it seemed that there could be no interest " by way of damages until the day had arrived when payment " became legal."

The same principle was expressed in the Court of King's Bench in *Du Belloix* v. *Waterpark (Lord)* (5). The action was by the payee against the maker of a promissory note, dated December 27, 1787, at Paris, payable six months after date. The action was tried before Abbott C.J., at the Guildhall sittings in January, 1822, and, apart from the general issue, the defendants pleaded the Statute of Limitations, but it is unnecessary to refer to this point.

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(1) (1921) 37 T. L. R. 662.
(2) [1947] K. B. 964.
(3) Ibid. 967.
(4) 37 T. L. R. 662, 663.
(5) (1822) 1 Dow. & Ry. 16.

In reply to a question by the jury whether they were bound to give the plaintiff interest as well as principal, Abbott C.J. charged them that, interest being the damage for the detention of the debt, the question was peculiarly for the jury's consideration, and the jury found a verdict for the principal sum only. On a motion for a rule to show cause why the amount of the verdict should not be increased by adding the interest due on the note from the day it became due until judgment, the Chief Justice is reported as saying (1): " But there is " another objection to the plaintiff's recovering interest on " the debt, for during the greatest part of that time he was an " alien enemy, and could not have recovered even the principal " in this country, and at all events during that portion of the " time the interest could not have run, and it would even " have been illegal to pay the bill whilst the plaintiff was an " alien enemy."

I do not really understand if the fact that the plaintiff was an alien enemy during the greater part of the time was a vital objection to his recovering any interest for that period, why the Chief Justice left the question of interest at large to the jury. However that may be, the court decided that the question of interest was peculiarly within the province of the jury. In that sense the passage in the Chief Justice's judgment is obiter dictum. But it plainly shows that, had he been sitting as a judge alone, he would have decided the question at common law in the same way as it was decided under the Bills of Exchange Act, 1882, in the two cases to which I have referred.

Reference was also made to *Wolff* v. *Oxholm* (2). This was an action for the recovery of a debt contracted in England by a Danish subject resident in Denmark with a house of trade established here and in a time of peace between the two countries. The case raised, and was decided on, considerations of international law arising out of a Danish ordinance passed during a period of hostilities between this country and Denmark quashing certain proceedings instituted in peace-time for the

(1) 1 Dow. & Ry. 16.

(2) (1817) 6 M. & S. 92.

recovery of the debt and the interest thereon. It was held that this ordinance, not being conformable to the usage of nations, did not bar the right of the plaintiffs to recover the debt and interest in an English court. It is true that neither in the argument nor in the judgment was any special reference made to the question of interest as distinct from the principal debt. It was sought to distinguish this case not only on this ground but also on the ground that the default had occurred before the war and therefore interest had already begun to run. I do not understand, however, even if that be so, on what principle, if the dictum of Abbott C.J., in *Du Belloix* v. *Waterpark* (*Lord*) (1) was right, that affects the right to recover in respect of the period during which the two countries were at war.

My attention was drawn to two American cases, *Hoare* v *Allen* (2), and *Brown* v. *Hiatts* (3). Both were claims for interest on a mortgage accrued due in the first case during the War of Independence, and, in the second, during the Civil War. Delivering the judgment of the Supreme Court in *Brown* v. *Hiatts*, Field J., said (4): " As the enforcement of " contracts between enemies made before the war is suspended " during the war, the running of interest thereon during such " suspension ceases. Interest is the compensation allowed by " law, or fixed by the parties, for the use or forbearance of " money, or as damages for its detention, and it would be " manifestly unjust to exact such compensation, or damages, " when the payment of the principal debt was interdicted."

It is clear, however, that the court drew no distinction between cases in which the claim for interest was based on the terms of the contract and those in which interest is allowed by law. Indeed, after a reference to *Hoare* v. *Allen* (2), and to another case in which it had been followed in 1791, the judge continued (4): " The counsel for the complainant attempts " to draw a distinction between those contracts in which " interest is stipulated and those to which the law allows " interest, and contends that the revival of the debt in the " first case, after the termination of the war, carries the interest " as part of the debt; while in the latter case interest is " allowed only as damages for the detention of the money. " We are, however, of opinion that the stipulation for interest " does not change the principle, which suspends its running

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(1) 1 Dow. & Ry. 16.
(2) (1789) 2 Dall. 102.
(3) (1872) 15 Wallace 177.
(4) Ibid. 185.

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" during war. In the first case cited, from Pennsylvania, " interest was stipulated in the contract. 'A prohibition,' " says Washington J., in *Conn* v. *Penn* (1), 'of all intercourse " ' with an enemy during the war, and the legal consequence " ' resulting therefrom, as it respects debtors on either side, " ' furnish a sound, if not in all respects a just reason, for the " ' abatement of interest until the return of peace. As a " ' general rule it may be safely laid down that wherever the " ' law prohibits the payment of the principal, interest during " ' the existence of the prohibition is not demandable.' "

This would indeed have been a formidable weight of authority had it stood alone. But I do not think that it does. In *Hugh Stevenson & Sons, Ld.* v. *Aktiengesellschaft für Cartonnagen-Industrie* (2), an English company and a German company had carried on a partnership business in England until the outbreak of war between Great Britain and the German Empire operated as a dissolution of the partnership. Thereafter the English company continued to carry on the business and to use the partnership's plant for that purpose. It was held by the House of Lords that the German company were entitled to a share of the profits made after the dissolution by the carrying-on of the business by the English company with the aid of the German company's share of the capital. The trial judge, the late Lord Atkin, had taken the view that they were not entitled to any share of the profits of the partnership since the date of the outbreak of war, and that view was supported by A. T. Lawrence J., in a dissenting judgment in the Court of Appeal. Their Lordships, however, were unanimously of opinion that the case fell to be decided on the equitable principles governing the winding-up of a partnership, which, as Lord Haldane (3) said, depends on the principles which courts of equity apply to persons who are in possession of property in circumstances in which they are treated as standing in a fiduciary relationship. Lord Haldane said (3): " It is more than and different from the procedure " which applies when the rights of parties arise merely out of the " rules of the common law which apply to contracts."

To decide otherwise than that the German partners were entitled to their fair share of the profits during the war would be to declare that the English partners were entitled to confiscate the property of the German partners for their own

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(1) Peters C. C. 496.

(2) [1918] A. C. 239.

(3) Ibid. 247.

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benefit, whereas in English law an enemy's right to his property in this country is not extinguished, but his claim to receive it during the war is merely postponed.

As to the two American cases, Lord Dunedin (1), expressly reserved his opinion whether those authorities would or would not be held to be in accordance with the law of this country. Lord Haldane made no comment on them. Lord Finlay, however, said (2): " These decisions seem to me not to be in " conformity with English law. The rule of international " law on this point, in the view of the courts of this country, " does not appear to have formed the subject of any express " decision in England. The judgment of Lord Ellenborough, " however, in *Wolff* v. *Oxholm* (3) appears to me to imply " that, in the view of Lord Ellenborough, interest on such a " debt would not cease to run during the continuance of the " war, but the point does not appear to have been argued. " It is difficult to see on what principle the interest is to be " forfeited if private property is to be respected."

Lord Atkinson said (4): " Two American cases and one " English (*Du Belloix* v. *Waterpark* (*Lord*)) (5) were cited as " going to establish that where the relation between the parties " is that of debtor and creditor interest does not accrue to an " alien enemy while he is an alien enemy. It is not very " easy to ascertain what precisely was the principle upon " which those decisions were based. As far as one can gather, " however, it appears to me to be this: that interest is in the " nature of damages payable by the debtor by reason of his " withholding his debt, his default in not paying his debt, and " since during war he cannot lawfully pay his debt to an alien " enemy without committing a crime, he is not in any default " in omitting to pay it, and should not therefore be mulcted " in damages for not doing what he cannot do lawfully. This " doctrine has been extended to a case where the debt was due " under a covenant by a mortgagor to pay interest on the " mortgage money, presumably on the ground that, though " the covenant was in form absolute and independent of the " payment of the mortgage debt, it was impliedly conditional " on default being made in payment of that debt. I do not " think these decisions are consistent with the principle of the " decision in *Wolff* v. *Oxholm* (3), in which, as I read the report, " interest which accrued due during the war with Denmark

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(1) [1918] A. C. 239, 248.
(2) Ibid. 245.
(3) 6 M. & S. 92.
(4) [1918] A. C. 255.
(5) 1 Dow. & Ry. 16

"was recovered, and besides I think they have not any application to the present case."

Lord Parmoor, said (1): "In the course of the argument "two American cases were called to the attention of your "Lordships, *Hoare* v. *Allen* (2) and *Brown* v. *Hiatts* (3). "These cases have not, in my opinion, any direct bearing "in this appeal, and I should require further research and "investigation before accepting them as an authority that "interest is not payable though there is a stipulation for its "payment. In such a case it is difficult to see any difference "in principle between the payment of interest and the payment "of a capital sum. The case of *Du Belloix* v. *Waterpark* "(*Lord*) (4) illustrates this point. This was an action on "a promissory note which did not contain a stipulation for "payment of interest. In the absence of such a stipulation "the judge directed the jury that interest was damage for "the detention of the debt, and that the question whether "it should be allowed was peculiarly for their consideration. "The jury found a verdict only for the principal sum named "in the note. The court held that the jury had been rightly "directed and that the question of interest was entirely for "them."

Referring to the passage in the judgment of Abbott C.J. quoted above, Lord Parmoor continued: "My Lords, in "my opinion this dictum would not apply either to a case "in which there is a stipulation for interest, or where there is "a fiduciary relationship between the parties on the dissolution "of a partnership."

In his judgment in *Ledeboter* v. *Hibbert* (5), Morris J., cites these passages from the speeches of Lord Finlay, Lord Atkinson and Lord Parmoor in full, but says that he does not read them as involving a rejection of the view expressed by Abbott C.J., in *Du Belloix* v. *Waterpark* (*Lord*) (4).

It may be putting it too high to speak of rejection, for, as I have already said, the appeal was decided on a broader principle. But at least it may be said that very slender support for the principle on which the decision of the registrar is based is afforded by such phrases as Lord Finlay's (6): "It is difficult to see on what principle the interest is to be "forfeited if private property is to be respected"; or Lord

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(1) [1918] A. C. 259.
(2) 2 Dall. 102.
(3) 15 Wallace 177.
(4) 1 Dow. & Ry. 16.
(5) [1947] K. B. 964, 969.
(6) [1918] A. C. 239, 245.

Atkinson's (1): "It is not very easy to ascertain what precisely "was the principle upon which those decisions were based," which is followed by an unfavourable comment on the supposed principle stated in terms indistinguishable from those employed in *Ledeboter* v. *Hibbert* (2), or Lord Parmoor's (3): "In such "a case it is difficult to see any difference in principle between "the payment of interest and the payment of a capital sum."

I am not concerned to express any opinion whether *Biedermann* v. *Allhausen & Co.* (4) and *Ledeboter* v. *Hibbert* (2), were rightly decided on the express provisions of the Bills of Exchange Act, 1882. I think, however, that I derive much surer guidance on the question how I should exercise my discretion from these dicta. However the case may stand regarding payment of interest by way of damages for a breach of contract, in my opinion the true principle underlying the award of interest in Admiralty is that in every £'s worth of damage in respect of which interest is ultimately awarded, the interest has accrued potentially from the moment when the damage was suffered until the liability has been adjudged and the amount finally ascertained.

The registrar speaks of the interest being not merely suspended but cancelled by the outbreak of war. But the suggestion that there is some distinction in this respect between the sum awarded as damages and the interest on it seems to me to be in conflict with the law as stated by Lord Finlay in his speech in *Hugh Stevenson & Sons* v. *Aktiengesellschaft für Cartonnagen-Industrie* (5), as follows: "It is not the law "of this country that the property of enemy subjects is "confiscated. Until the restoration of peace the enemy can "of course, make no claim to have it delivered up to him, "but when peace is restored he is considered as entitled to "his property with any fruits which it may have borne in the "meantime."

After all, it is the injured plaintiffs who have been kept out of the damages justly due to them, and the wrongdoers, or their insurers, have had the use of the money meanwhile. In holding, as I do, that interest should run from the date of the casualty to June 23, 1949, I think that I am following a line of reasoning which Lord Finlay, Lord Atkinson and Lord Parmoor would have applied to a case like the present.

(1)]1918] A. C. 256.
(2) [1947] K. B. 964, 969.
(3) [1918] A. C. 259.
(4) (1921) 37 T. L. R. 662.
(5) [1918] A. C. 239, 244.

No question has been raised regarding the fixing of the rate of interest at 4 per cent., which seems to me to be reasonable. Accordingly, I vary the registrar's report further by including interest at this rate from the date of the casualty, and I give judgment accordingly.

Award varied.

Solicitors: *Bentleys, Stokes and Lowless; Wm. A. Crump & Son.*

H. G.

1950
Jan. 30;
Feb. 10.

Hodson J

MACDARMAID *v.* ATTORNEY-GENERAL.

Legitimacy—Onus of proof—Petitioner born before marriage of parents—Previous marriage of petitioner's father—Disappearance of first wife—No evidence of first wife's death before date of petitioner's birth—Burden of proof—Legitimacy Act, 1926 (16 & 17 *Geo.* 5, *c.* 60), *s.* 1, *sub-ss.* 1, 2.

On a petition for legitimacy the onus is on a petitioner, whose father or mother was married to a third person before the petitioner's birth, to prove facts from which the cessation of the earlier marriage before that birth may properly be inferred.

There is no presumption of law as to the continuance of life, but each case must be determined on its own facts.

Where, therefore, it was proved that the petitioner's father had been married to a third person who was last seen, at the age of 27 in normal health and circumstances, some three years before the petitioner's birth, and of whom nothing had since been heard,

Held, that the proper inference to draw on the probabilities of the case was that the father's first wife was still alive when the petitioner was born, and that the petitioner was therefore not legitimated by the subsequent marriage of her parents.

LEGITIMACY PETITION.

The petitioner, Mrs. Ellen Elizabeth MacDarmaid, claimed a declaration that her parents, Cadogan Thomas and Elizabeth Ann Thomas, were lawfully married on March 10, 1925, and that by that marriage she became legitimated by s. 1 of the Legitimacy Act, 1926 (1). A question of

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(1) Legitimacy Act, 1926, s. 1, sub-s. 1: "Subject to the provisions of this section, where "the parents of an illegitimate "person marry or have married "one another, whether before or "after the commencement of "this Act, the marriage shall, "if the father of the illegitimate "person was or is at the date

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liability for succession duty depended on the finding of the court.

The petitioner was born on March 14, 1894. Her father had married his first wife, Rosa Johnston, in 1886. Evidence was given at the hearing of the petition that they did not live together, that there was a child which died almost immediately, and that the first wife was last seen at a roller-skating rink in 1891, when she would have been some twenty-seven years of age. There was no evidence as to her subsequent history or as to her death. The petitioner's father and mother were married in 1925: they were described in the marriage certificate as "widower" and "spinster." The father died in 1931, the mother in 1940. The petition was served upon two surviving brothers of the father.

An application to the registrar general for the re-registration of the birth under the provisions of the schedule to the Legitimacy Act, 1926, had previously been refused on the ground that there was no evidence of the death of the father's first wife before the date of the petitioner's birth.

By his answer the Attorney-General put the petitioner to proof of the matters set forth in her petition.

Theodore Turner, K.C., and *Ifor Lloyd* for the petitioner. There is no onus on the petitioner to prove that her father's first wife was dead when she was born: it is necessary only for her to show that it had not been established that the first wife was then alive. Whereas s. 8 of the Matrimonial Causes Act, 1937, imposes a positive burden of proof upon the petitioner to satisfy the court that the respondent may be presumed to be dead until the burden of proof is shifted after a seven years unexplained absence, s. 1, sub-s. 2, of the Legitimacy Act, 1926, imposes no onus of showing that the parent was not married to a third person when the illegitimate person was born. Indeed, the section is very carefully drawn so as not to lay too heavy a burden on a petitioner who is likely to meet with difficulties in establishing circumstances existing at the date of his or her birth, and, the emphasis in sub-s. 1 of the section is that, ". . . . The "marriage

"of the marriage domiciled in "England or Wales, render that "person, if living, legitimate from "the commencement of this Act, "or from the date of the marriage, "whichever last happens."

Sub-section 2: "Nothing in "this Act shall operate to legitimate a person whose father or "mother was married to a third "person when the illegitimate "person was born."

"*shall* . . . . render that person . . . . legitimate . . . ." [They referred to *Parkinson* v. *Parkinson* (1), and to *In re Phene's Trusts* (2).]

Frank Stockdale for the Attorney-General. A declaration of legitimacy cannot be made until the court is satisfied that both parents were free to marry when the petitioner was born, and the onus is on the petitioner to satisfy the court that she was born after the death of her father's first wife, or to prove circumstances which would be accepted as prima facie evidence that that death had occurred by then.

Turner K.C. in reply. It is not necessarily to be presumed that the death of a person who has been absent for seven years occurred at the conclusion of that period: the probability might well be that it occurred at the beginning. [*Nepean* v. *Doe d. Knight* (3), referred to.]

Cur. adv. vult.

Feb. 10. HODSON J. reading his judgment, stated the facts and continued: It is argued for the petitioner that no onus is cast on her by s. 1, sub-s. 2, of the Legitimacy Act, 1926, to prove that her father's first wife was dead. and that, as the matter is left in doubt by the evidence, the petitioner is accordingly entitled to succeed. On behalf of the Attorney-General, on the other hand, it is argued that sub-s. 1 does not come into operation in the case of a person whose father was married to a third person before the date of her birth unless there is evidence upon which, despite the marriage, a declaration of legitimacy can be made. In these circumstances, it is contended that the onus is on the petitioner to prove that the death of the first wife occurred on or before March 14, 1894, or to prove circumstances or facts which the court should accept as prima facie evidence that that death occurred.

In my judgment, the proposition contended for by the Attorney-General is correct, and, once the fact of the previous marriage is proved, the petitioner must at least prove facts from which the cessation of the first marriage can properly be inferred before she can succeed.

Where a person has not been heard of by persons who would naturally have heard of him, if alive, he will be presumed to be dead after a lapse of seven years: *Doe d. Knight* v.

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(1) [1939] P. 346, 353.

(2) (1869) L. R. 5 Ch. 139, 150–1, 152.

(3) (1837) 2 M. & W. 894, 912, 913, 914.

Nepean (1), confirmed by the Court of Exchequer Chamber in *Nepean* v. *Doe d. Knight* (2). The petitioner cannot rely on this presumption since the first wife was seen alive in about 1891, or, at any rate, within seven years of the birth of the petitioner. Moreover, in view of her age and the circumstances in which she was last seen, there are no particular facts from which the inference that she died within the seven years can, in my opinion, properly be drawn. Even if the matter be approached from another direction, namely, that it is for the Attorney-General to establish that the first marriage existed at the time of the birth of the petitioner, the same conclusion is reached.

There is no presumption of law as to continuance of life, but each case must be determined on its own facts. This is established by the authority of Lord Denman, who delivered both the judgments in *Doe* v. *Nepean* (3), and who thus expressed himself in *Rex* v. *Harborne Inhabitants* (4): "I "must take this opportunity of saying, that nothing can be "more absurd than the notion that there is to be any rigid "presumption of law on such questions of fact, without "reference to accompanying circumstances, such, for instance, "as the age or health of the party. There can be no such "strict presumption of law"—he is dealing with the presumption of the continuance of life—"In *Doe d. Knight* "v. *Nepean* (1) the question arose much as in *Rex* v. *Twyning* (5). "The claimant was not barred, if the party was presumed "not dead till the expiration of the seven years from the last "intelligence. The learned judge who tried the cause held "that there was a legal presumption of life until that time, "and directed a verdict for the plaintiff, because, if there was "a legal presumption, there was nothing to be submitted to "the jury. But this court held, that no legal presumption "existed, and set the verdict aside. That is quite consistent "with the view which we take in the present case; and *Rex* v. "*Twyning Inhabitants* (5) may be explained in the same way. "I am aware that, in this latter case, Bayley J. founds his "decision on the ground of contrary presumptions; but "I think that the only questions in such cases are, what "evidence is admissible, and what inference may fairly be "drawn from it. It may be said, suppose a party were shewn

(1) (1833) 5 B. & Ad. 86.
(2) 2 M. & W. 894.
(3) 5 B. & Ad. 86; 2 M. & W. 894.
(4) (1835) 2 Ad. & El. 540, 544.
(5) (1819) 2 B. & Ald. 386.

"to be alive within a few hours of the second marriage, is "there no presumption there?"—the presumption there being the presumption of continuance of life, I suppose.

The judgment of Bayley, J., whose observations to the effect that the presumption of the continuance of life is offset by the presumption of innocence of crime are not accepted by Lord Denman, is to be found in *Rex* v. *Twyning Inhabitants* (1).

Before citing the passage from the *Harborne* case (2), Giffard L.J., in *In re Phene's Trusts* (3), cited the following passage from the judgment of Lush, J., in *Reg.* v. *Lumley* (4) "The existence of the party at an antecedent "period may or may not afford a reasonable inference that "he was living at the subsequent date. If, for example, "it were proved that he was in good health on the day "preceding the second marriage, the inference would be "strong, almost irresistable, that he was living on the latter "day, and the jury would in all probability find that he was "so. If, on the other hand, it were proved that he was then "in a dying condition, and nothing further was proved, "they would probably decline to draw that inference. Thus "the question is entirely for the jury." After citing the passage from Lord Denman's judgment (1) which I have just read, Giffard L.J. added (5): "The notion of a legal "presumption in favour of life originated, I believe, with the "civil law; and we have Sir William Grant's opinion in *Mason* v. "*Mason* (6) as to adopting presumptions of fact from that law."

Applying the law as laid down in those decisions to the facts of this case, without reliance on any presumption, I find that, as the first wife had been seen alive in about 1891 at Olympia at the age of 27, and as nothing abnormal about her health or circumstances was observed, save that she was said to have aged somewhat, the proper inference to draw on the probabilities of the case is that she was still alive in 1894 when the petitioner was born. In my judgment, therefore, the petition fails and must be dismissed.

Petition dismissed.

Solicitors: *Evill & Coleman; The Treasury Solicitor.*

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(1) 2 B. & Ald. 386.

(2) 2 Ad. & El. 540, 544.

(3) L. R. 5 Ch. 139, 150.

(4) (1869) L. R. 1 C.C.R. 196, 198.

(5) L. R. 5 Ch. 151.

(6) (1816) 1 Mer. 308.

J. B. G.

LOWNDES *v.* LOWNDES

1950

Feb. 23; *Mar.* 31; *Apr.* 3, 5.

Willmer J.

Husband and wife—Divorce—Collusion—Financial agreement—Wife petitioner—Husband desirous of divorce—Sum made payable to wife on pronouncement of decree nisi—Negotiations for maintenance pending decree—Application by husband for decree absolute—Supreme Court of Judicature (*Consolidation*) *Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *ss.* 178, 183, *sub-s.* 3—*Matrimonial Causes Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 57), *ss.* 4, 9—*Matrimonial Causes Rules,* 1947 (*St. R. & O.* 1947, *No.* 523/*L* 9), *r.* 40 (3).

If a promise to pay maintenance or costs is the consideration for a promise relating to the initiation or conduct of matrimonial proceedings, the suit is collusive, and it is immaterial that the wife has an ultimate right to maintenance or costs.

Any negotiations for maintenance taking place while proceedings are pending must be disclosed to the court.

A husband respondent was anxious that his marriage should be dissolved, and he did not defend the charges of cruelty made against him in his wife's petition, although he did not agree that those charges were true. The wife, however, showed considerable reluctance to proceed with the suit, and the husband's brother, acting as his agent, executed with a friend of the wife on the day before the petition was heard a document described as a "declaration of trust." The effect of that document was that 2,000*l*. was to be deposited in trust to be paid to the wife should a decree nisi be granted, but to be repaid to the husband if she did not proceed with the petition or if she did and a decree were refused. A decree nisi was in fact pronounced on the day after the execution of the deed, and the 2,000*l*. was handed over to the wife. The wife failed to apply for the decree to be made absolute, and gave information of the financial transaction to the King's Proctor. The husband was informed of this, and a summons was issued by him to show cause why the decree nisi should not be made absolute. On reference of the matter to the judge,

Held, that the deposit of the 2,000*l*. was intended to be and was treated as being given in consideration of the wife petitioner's going on with the case; that such conduct amounted to collusion; that an arrangement whereby the husband was to obtain his freedom irrespective of the merits of the case was clearly a matter which tended to pervert the course of justice and that the summons must accordingly be dismissed and the decree nisi rescinded.

SUMMONS adjourned into open court.

The parties were married in 1920. In October, 1948, the wife filed a petition for divorce on the ground of cruelty; in December, 1948, the husband by his answer denied the allegations in the petition and cross-prayed for divorce on the ground of his wife's cruelty. The wife by her reply denied his allegations. In May, 1949, the answer was struck out on the application of the wife, which application was not opposed. The wife was granted a decree nisi of divorce on July 27, 1949, but she did not make an application for decree absolute; instead, she disclosed to the King's Proctor in October, 1949, certain information (referred to below) which gave rise to a suspicion of collusion. The husband was informed of the allegation of collusion, which he disputed. In order to give him an opportunity to be heard, a summons was issued by him and served on the wife "to show cause why the decree nisi . . . . should "not be made absolute and for directions." The matter came before the registrar in pursuance of the Matrimonial Causes Rules, 1947, r. 40 (3), and was referred to the judge. The King's Proctor attended and was represented by counsel. The summons was adjourned into open court.

The allegation of collusion arose out of certain negotiations at the time of the decree nisi, and the following account of those negotiations is summarized from the judgment:

After the husband had filed his answer, he decided to marry another woman, whom he had recently met, if his present marriage were dissolved. To avoid the risk of a stalemate should he contest his wife's petition, he allowed his answer to be struck out so that the petition might be undefended. He told the court in evidence that it had been his intention to make provision for his wife by his will had the marriage continued, and that he had intended in those circumstances to leave her a legacy of some 2,000*l.* (to cover the expenses of a new home) and an income of 2,000*l.* a year. In view of the impending divorce, he said, he had desired to make a similar provision for her on the dissolution of the marriage, the income to be secured on certain debentures; and proposals of this nature were in fact put forward by the solicitors then acting for him in the spring of 1949.

The wife, however, became very jealous of the woman whom the husband wished to marry, and she also mistrusted her husband's financial intentions. She adopted the attitude that she was not going on with the case. By then, the husband's answer had been struck out; and his brother, Roy Lowndes, went to see the wife to try to persuade her to continue the proceedings and to explain the husband's intention to make financial provision for her. But she remained suspicious; there were further negotiations; and on July 26, 1949, the day before the petition was heard, Roy Lowndes executed with a friend of the wife—one Haydock—a document described as a declaration of trust. The effect of that document was that 2,000*l.* was to be deposited by Roy Lowndes with Haydock in trust to pay it to the wife if the decree nisi were granted, but " in the event of the said divorce suit not being proceeded with " on July 27, 1949, for any reason, or being proceeded with and " a decree nisi not being granted by the court," to repay it to Roy Lowndes. A banker's draft for 2,000*l.* was handed over to Haydock. On the following day the case was heard and the decree nisi was pronounced. The banker's draft was handed over to the wife. Shortly afterwards the husband repaid the 2,000*l.* to his brother.

In October, 1949, the husband told Mrs. Haydock that he contemplated suing the wife for the return of the money on the ground that by not applying for the decree absolute she had not fulfilled the conditions under which the money was given to her.

The husband stated in evidence, in answer to a question put by Willmer J., that he did not agree with the wife's allegations of cruelty. He said that there was an essence of truth in what she had said in her petition, but that it was badly twisted.

The procedure adopted by the court at the hearing of the summons is referred to at the beginning of the judgment.

Colin Duncan for the King's Proctor. [He referred to *Emmanuel* v. *Emmanuel* (1), *Malley* v. *Malley* (2) and *Poulden* v. *Poulden* (3).] It must be accepted, it is submitted, that a party in matrimonial proceedings is bound by the acts of his or her agent, although an agent might exceed the terms of his agency, and in such a case common-law principles would apply and the acts of the agent would not bind the principal. *Churchward* v. *Churchward* (4) may be referred to as showing that a new suit might be instituted free of the taint of collusion.

Where there has been an agreement as to maintenance or costs or as to any payment to which a wife may have an ultimate or present right, it remains a collusive arrangement or agreement if the consideration for the promise to pay is a promise relating to the initiation or conduct of the suit. Even

(1) [1946] P. 115.
(2) (1909) 25 T. L. R. 662.
(3) [1938] P. 63, 66.
(4) [1895] P. 7, 31, 32.

though the wife were entitled to the sum, if it were paid by way of bargain that bargain would be collusive: see *Laidler* v. *Laidler* (1), in which *Malley* v. *Malley* (2) was questioned, and *Beattie* v. *Beattie* (3). On the authorities the vital considerations in the present case are as follows:—(1.) Was Roy Lowndes the agent of the husband? (2.) Was the payment of the 2,000*l* an inducement to continue proceedings? If so then the arrangement was collusive.

Theodore Turner, K.C., and *Gordon Friend* for the husband. Mere bargaining as to maintenance is not collusive, for it may be claimed in a petition and negotiations begun forthwith. To establish collusion there must be some element the tendency of which is to pervert the normal course of justice. There must be an element of impropriety.

[WILLMER J. The issue would appear to be that whereas you submit that for the transaction to be collusive the payment must be made in consideration of something improper being done, Mr. Duncan submits that the transaction is collusive whether or not it is to effect something improper. Does not *Churchward* v. *Churchward* (4) support the latter contention?]

Churchward v. *Churchward* (4) must be considered in relation to the facts of that case, in which the most important part of the bargain was that no damages should be offered. That bargain put it out of the power of the court to decide (*a*) if it was a case in which there should be a decree at all (*b*) if there ought to be damages. It was a case in which the agreement tended to pervert the course of justice and to keep from the court facts which might have influenced it. Although it would appear from *Beattie* v. *Beattie* (3) that a broader interpretation might be put on *Churchward* v. *Churchward* (4), it is submitted that such an interpretation would not be justified on the facts of *Churchward* v. *Churchward* (4).

[WILLMER J. The husband in his evidence before me said that he could not agree that his wife's case as presented was a true case. Indeed, by his answer he had sworn that it was not, although he did not proceed with it. By this agreement, therefore, an undefended case was presented to the court which was considered a false case by the party found guilty. Although no objection can be taken to the withdrawal of a defence, the position here is that the husband encouraged the wife to proceed with a case which he himself regarded as false.]

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(1) (1920) 36 T. L. R. 510.

(2) 25 T. L. R. 662.

(3) [1938] P. 99, 102–3.

(4) [1895] P. 7, 31, 32.

The court was not prevented thereby from hearing facts which it would otherwise have heard. The negotiations never concerned the merits of the case: indeed, the husband knew that, even were he to succeed in his denial of cruelty, he would fail should adultery which he had committed subsequent to the date of the petition be alleged against him. It is quite certain on the evidence that neither side was considering the merits of the case. The husband wished to remarry, and the wife was concerned about her financial position. There is no evidence whatever that she had any tremor ot conscience as to the validity of her case.

[WILLMER J. Although this was a wife's petition, it was not a case of the wife's getting the relief she wanted so much as of the husband's getting the freedom he was anxious to obtain.]

There is no vice in a respondent's wanting freedom.

[WILLMER J. I do not dispute that. What troubles me is the fact that it was not the petitioner, but the respondent, who was in effect prosecuting the case.]

This was a wife's petition throughout. It is submitted that the supervening fact that the husband wanted the proceedings to go through is an irrelevant consideration. There had been negotiations as to maintenance, as permitted by s. 10 of the Matrimonial Causes Act, 1937, from the start of the proceedings; and the husband's terms had been communicated to the wife's solicitors before the withdrawal of defence. When the wife by her indecision created a new situation, the husband refused to negotiate about those terms, or alter them. He paid the sum which he had always intended to pay into neutral hands.

[The evidence was then considered in detail.]

Geoffrey Lawrence and *Scarman*, for the wife, did not oppose the husband's application. It was stated that she desired the marriage to be dissolved.

Cur. adv. vult.

Apr. 5. WILLMER J. This is an application for decree absolute under s. 183, sub-s. 3, of the Supreme Court of Judicature (Consolidation) Act, 1925, by the party against whom a decree nisi has been pronounced. The matter came before the registrar in pursuance of r. 40 (3), of the Matrimonial Causes Rules, 1947, and was referred to the judge. It duly came before me in chambers, when it appeared that the situation which had arisen was not covered by the rules. The

King's Proctor attended the summons by counsel, and I was informed that the petitioner wife, who had been granted the decree nisi, had herself disclosed to the King's Proctor certain information, which prompted suspicion of collusion. Had it been an ordinary case in which the application for decree absolute was being made by the party in whose favour the decree nisi was pronounced, the King's Proctor would, I was informed, have wished to intervene and show cause against the decree being made absolute.

But unfortunately when sub-s. 3 was added to s. 183 of the Act of 1925 by s. 9 of the Matrimonial Causes Act, 1937, no consequential alteration was made in the rules, and no provision was made for an intervention by the King's Proctor in a case such as this, where the application for decree absolute is made by the party against whom the decree nisi was pronounced. In the circumstances, I was invited to give directions. I adjourned the matter into court, and directed that the evidence of the relevant witnesses should be there taken viva voce. I also requested the King's Proctor to attend and afford me the benefit of his assistance. I would like to take this opportunity straight away of acknowledging my indebtedness to counsel for the King's Proctor, who has been of great assistance to me in dealing with the case. Since no procedure has been laid down by rule, we had to invent our procedure as we went along. Under my direction counsel for each party called his own witnesses, and counsel for the King's Proctor at my request called certain others, whose evidence it was thought should be before the court. In the result I feel satisfied that I have heard all the relevant evidence.

[His Lordship, referred to the facts and found notwithstanding a conflict of evidence, that the husband knew and approved of the plan whereby his brother, Roy Lowndes, handed over the 2,000*l*. to the stakeholder, Haydock, and continued :] That finding of fact [that the husband knew and approved of the plan] goes to increase, if anything, the suspicion that this was a case in which collusion was present. The statute provides that a decree is only to be pronounced if the court is satisfied that the petition is not presented or prosecuted in collusion with the respondent. As was pointed out by Denning J., in *Emmanuel* v. *Emmanuel* (1), there is, of course, a presumption of innocence, but that is only a provisional presumption, which is counter-balanced by circumstances which lead to suspicion, which there certainly were here. In such cases a party in the position of the husband, who is seeking to have the decree made absolute, is left, as he began, with the legal burden of negativing collusion. He has to satisfy the court. It is true that he does not have to do so beyond a reasonable doubt, but at least he must do so on balance of probabilities; and, if he leaves the matter evenly balanced on the evidence, the legal burden comes into play and the court must say that it is not satisfied that there has been no collusion.

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(1) [1946] P. 115.

I have had the advantage of being referred to a number of authorities on the meaning of collusion, which is defined in Rayden on Divorce (5th ed.) p. 136, as follows: " Collusion " means an agreement or bargain between the parties to a suit, " or their agents, whereby the initiation of the suit is procured " or its conduct provided for." Paragraph 12, on the next page, is equally important and states: " *Agreements as* " *to maintenance and costs.* It is immaterial that the wife " has an ultimate right to maintenance or costs; if a promise " to pay costs or maintenance is the consideration for a promise " relating to the initiation or conduct of proceedings, the suit " is collusive." *Churchward* v. *Churchward* (1), *Laidler* v. *Laidler* (2) and *Beattie* v. *Beattie* (3) are among the cases cited in support of that proposition. There is a relevant passage in *Beattie* v. *Beattie* (3), to which I should refer, in which Lord Merriman P., says (4): " In passing I ought to say that " I share the view which McCardie, J., took of the decision in " *Malley* v. *Malley* (5) where Lord Mersey had said in effect " that if the arrangements related to something—costs, for " example, or maintenance—with regard to which the wife " had rights which she could enforce, the arrangement was not " collusive. I agree with the late McCardie, J.'s, comments " on that decision in the case of *Laidler* v. *Laidler* (2). It may " be an important factor in deciding whether the arrangement " is collusive or not, but it cannot be decisive that the " bargain, if there is a bargain, is one which relates to something " which the wife could otherwise get by some process of law."

That statement of Lord Merriman, P., is of value and importance in regard to part of the argument addressed to me by counsel for the husband by whom it was contended that the definition which I have read from Rayden on Divorce is insufficient and incomplete, and that in order to constitute collusion there must in addition be present an element of corruption or perversion of justice. Mr. Turner argued that, upon any view of the facts of this case, what was done was in no sense corrupt and did not in any way tend to pervert the course of justice. He very properly referred to the fact that since the Matrimonial Causes Act, 1937, it has been legitimate to present claims for maintenance on behalf of the wife at any time after the petition has been presented, and he contended that in those circumstances there can now be nothing improper in conducting negotiations as to maintenance at any stage of the proceedings. If that be so, he argues, then the mere fact that an arrangement has been made between the parties for the purpose of reassuring the wife as to her financial position, whereby the husband agrees to pay in respect of maintenance something which the wife would be legally entitled to recover, cannot in any way be regarded as tending to pervert the course of justice and consequently to have been collusive.

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(1) [1895] P. 7.
(2) 36 T. L. R. 510.
(3) [1938] P. 99.
(4) Ibid 103.
(5) 25 T. L. R. 662.

I do not think that it is necessary for me in this case to express any opinion upon the question of conducting negotiations for maintenance during the pendency of the proceedings, except to say this: that in my view any such negotiations ought clearly to be brought out into the light of day, and must be disclosed to the court. if they have taken place. It is not suggested that that was done in the present case at the time of hearing, or, indeed, until the petitioner herself gave information to the King's Proctor. It is also important to remember, in connexion with Mr. Turner's argument, that no claim for maintenance, whether the amount was agreed or not, could be enforced: that is to say, the court is not able to make an order until after a decree nisi has been pronounced. In those circumstances, one may be permitted to ask oneself the question, what, then, is the purpose of making a payment before decree nisi, unless it is meant to be an inducement to the other party to do something which she would not, or might not, otherwise do? Let it be assumed that it is proper, pending trial, to enter upon negotiations with regard to maintenance: it remains true, however, in my judgment, as stated in the passage in Rayden on Divorce to which I have referred, that a promise to pay maintenance in consideration of a promise relating to the initiation or conduct of the case makes the suit collusive ; and a fortiori if an actual payment is made in consideration of the case being proceeded with.

The question comes to this, then, on the facts : am I to infer that this payment was in fact made in consideration of the case being proceeded with ? [His Lordship considered the relevant evidence and continued :] In the circumstances I feel that the only inference which I can draw is that this arrangement arrived at between Roy Lowndes and Haydock was intended as an inducement to the wife to go on with her case. It was a matter which was calculated to induce her to go on, and I am quite unable to say on the evidence that she was not so induced. In other words, in my judgment the deposit of the 2,000*l*. was intended to be and was treated as being given in consideration of the wife's going on with the case. To my mind such conduct clearly falls within the definition of collusion which I have already read out from the textbook and which I accept.

I would add this, however, in deference to Mr. Turner's argument on behalf of the husband : I have already referred to his contention that in order to constitute collusion there must be present some element tending to pervert the course of justice. In connexion with that I consider it right to add that in my judgment that is precisely what we have in this case, in which a husband, desirous of obtaining his freedom, induced his wife by a money payment, or more correctly by a deposit of money, to prosecute a petition which he himself described as " badly twisted," if not actually false. That appears to me to amount to no more and no less than an attempt to obtain the judgment of this court not on the merits of the case, but rather by way of arrangement between the two parties. And an arrangement whereby the husband is to obtain his freedom irrespective of the merits of the case strikes me as being clearly something which does in fact tend to pervert the course of justice.

In those circumstances I find myself quite unable to say that I am satisfied that this petition was not presented in collusion with the respondent, and my duty, therefore, is to dismiss this summons and to rescind the decree nisi.

Application dismissed
Decree nisi rescinded

Solicitors: *Ashurst, Morris, Crisp and Co.; Gordon Dadds & Co.; The King's Proctor.*

J. B. G.

1950
Mar. 8, 15.

Willmer J.

E. *v.* E.

Husband and wife—Divorce—Cohabitation resumed after decree nisi—Subsequent application for decree absolute—Matrimonial Causes Rules, 1947 (*St. R. & O.* 1947, *No.* 523/*L.* 9, *as amended by St. R. & O.* 1947, *No.* 1757/*L.* 21), *r.* 40.

Notwithstanding the changes in procedure prescribed by rules of court for obtaining a decree absolute, the court still has jurisdiction to allow an application for such a decree in cases where, subsequent to the decree nisi, the matrimonial offence for which it was pronounced has been condoned, and then revived by the subsequent conduct of the guilty spouse.

Moore v. *Moore* (*Queen's Proctor showing cause*) [1892] P. 382, and *Rogers* v. *Rogers* (*Queen's Proctor showing cause*) [1894] P. 161, followed.

Per curiam. In the absence of any provision in the rules, parties making application in such cases for decree absolute, and their professional advisers, are under a duty to make the fullest possible disclosure to the court of all material facts; and, where allegations are made which may affect the opposite party or persons not parties to the suit, notice should be served on them giving full particulars of the charges made.

Observations on r. 40 of the Matrimonial Causes Rules, 1947.

SUMMONS adjourned into open court.

The applicant wife was granted a decree nisi in June, 1948, on the ground of her husband's adultery. The suit was undefended. After decree nisi, the parties resumed cohabitation and lived together in Eire until May, 1949. In June, 1949, the husband deserted the wife. There was reason to believe that, whereas he was domiciled in England when the petition was presented, he had subsequently acquired a domicile of choice in Eire.

In 1950 the wife made application for leave to apply to have the decree nisi made absolute. more than one year having elapsed since that decree. The registrar referred the matter to the judge, who asked for the assistance of the King's Proctor and adjourned the summons into open court.

J. E. S. Simon for the wife.
Colin Duncan for the King's Proctor.

Cur. adv. vult.

Mar. 15. WILLMER J., reading his judgment, referred to the facts and continued: The situation in this case is exactly that which arose in *Beard* v. *Beard* (1), and, on the authority of the decision in that case, there can be no doubt that in the events which have happened the wife has good grounds for seeking relief. The question which gave rise to doubt in my mind is whether the wife is entitled to relief in these proceedings. It is clear that, if she had taken steps to have this petition dismissed and had then launched a fresh petition alleging the original act of adultery, admitting the subsequent condonation, but setting up the husband's later desertion by way of revival of the condoned adultery, she would have had an impregnable case. The wife, however, was reluctant to take this course, because, as she alleged, there were grounds for thinking that since the previous proceedings the husband had abandoned his English domicile and had acquired a new domicile of choice in Ireland. In the circumstances it was strenuously argued before me that there was no need to have recourse to fresh proceedings, but that the wife, having disclosed all the material facts which have arisen since decree nisi, was entitled to obtain her relief in this suit, in which no question of domicile arose.

I have come to the conclusion that this case is covered by the authority of *Moore* v. *Moore* (*Queen's Proctor showing cause*) (2). In that case a period of over eight years had elapsed, during part of which the petitioner resumed cohabitation with the respondent and continued to live with him until she again left him on the ground of his cruelty. On an application to make absolute the decree nisi granted eight years before, it was held by Gorell Barnes J., that the subsequent cruelty of the husband placed the petitioner in the position which she occupied when she obtained the decree nisi, and that she was entitled to have the decree made absolute. Two years later, in *Rogers* v. *Rogers* (*Queen's Proctor showing cause*) (3), where a wife, having obtained a decree nisi, condoned her husband's misconduct, but alleged that that condonation was cancelled by subsequent adultery on his part, counsel for the Queen's Proctor expressly raised the question whether it was competent for the court in the existing proceedings to take notice of the subsequent adultery for the purpose of granting a decree; or whether, on the other hand, there must be a fresh suit. On this point the President held himself bound by *Moore* v. *Moore* (2) and stated that he would have held

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(1) [1946] P. 8.
(2) [1892] P. 382.
(3) [1894] P. 161.

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that the condonation proved did not form a ground for rescinding the decree; but, on the particular facts of that case, he held that the Queen's Proctor was entitled to succeed on the ground of collusion, and on that ground the decree nisi was rescinded.

These cases were, of course, decided under the powers conferred by the Matrimonial Causes Act, 1857, as amended by s. 7 of the Matrimonial Causes Act, 1860. But the statutory provisions now in force, namely ss. 181, 182 and 183 of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by s. 9 of the Matrimonial Causes Act, 1937, do not differ in any sense material to the present case. The great change which has taken place is in the procedure prescribed by Rules of Court for obtaining a decree absolute. Whereas until recently the decree absolute was pronounced, as a judicial act, by the judge in open court, provision is now made, by r. 40 of the Matrimonial Causes Rules, 1947 (1), for decree absolute to be obtained by a ministerial act on the part of the registrar. No machinery exists under the rule for dealing with the sort of question that has arisen in this case. The rule imposes no obligation on the party who has obtained the decree nisi to make any disclosure with regard to his or her conduct since decree nisi; nor has the registrar any duty, or (it would seem) any power, to inquire. If the application is made within a year from the date of the decree nisi, it would appear that the registrar is bound under the rule to let the notice be filed on being satisfied that no appeal is pending and that no appearance has been entered, or affidavit filed, on behalf of any person wishing to show cause against the decree being made absolute. If more than a year has elapsed, the party who obtained the decree nisi must, it is true, file an affidavit and the registrar has a discretion to grant or withhold leave. But it is clear that, so far as the rule is concerned, the applicant's affidavit is required only for the purpose of accounting for the delay, and the registrar's discretion is apparently limited to this aspect of the matter. What strikes me as even more arresting is the fact that no provision is made under the rule for giving notice to other parties who may be affected.

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(1) The Matrimonial Causes Rules, 1947, r. 40 (as amended): "(1.) An application by a spouse "to make absolute a decree nisi "pronounced in his favour shall "be made by lodging in the "registry where the cause is "proceeding a notice of application in accordance with form 14 "on any day after the expiration "of the period prescribed for "making such decree absolute. "The registrar having searched "the court minutes and being "satisfied—

"(*a*) that no appeal against "the said order is pending,

"(*b*) that no order has been "made by the Court of Appeal "enlarging the time for appealing against the said decree "(or, if any such order has "been made, that the time so "enlarged has expired),

"(*c*) that no appearance has "been entered (or if appearance "has been entered that no "affidavits have been filed "within the time allowed for "filing), by or on behalf of any "person wishing to show cause "against the decree being made "absolute,

"the notice shall be filed:

"Provided that if the application is made after the expiration "of one year from the date of "the decree nisi there shall be "lodged with the notice an "affidavit by the applicant "accounting for the delay, and "the notice shall not be filed "without the leave of the "registrar.

"(2.) Upon the filing of the "said notice the decree nisi shall "become absolute.

"(3.) An application by a "spouse to make absolute a "decree nisi pronounced against "him shall be by summons to "the registrar . . . . [who] ". . . . may make such order as "he thinks fit, or may refer the "application to the judge.

"(4.) A certificate . . . . that "the decree has been made absolute shall be prepared and filed "by the registrar . . . ."

Suppose that a petitioner, after obtaining a decree nisi, has condoned the respondent's offence, but wishes to apply for decree absolute on the ground that the original offence has been revived by fresh misconduct on the part of the respondent: it may be sought to make the most horrible charges, as, for instance, of cruelty or bestiality; but no provision is made by the rule for giving notice of them to the respondent or for affording him or her an opportunity to be heard on them. If it is alleged that the respondent has been guilty of subsequent adultery, there is no machinery under the rule for giving notice to the party with whom that adultery is alleged to have been committed. It may be that, if any such matter is brought to the attention of the court, its powers under s. 197 of the Supreme Court Judicature (Consolidation) Act, 1925, are sufficient to protect the rights of third parties. But it is at least a matter for some surprise that no provision has been made in the rules for such an eventuality; and it seems clear that when the present rules were drafted it was never contemplated that application for decree absolute might be made in such circumstances. Yet if the petitioner is entitled to apply for decree absolute in the present case, plainly she could equally have done so had she relied on an allegation of adultery, instead of desertion, as reviving the respondent's previous misconduct.

Having regard to the provisions of the rules as they now stand, I have given anxious consideration to the question whether jurisdiction now exists to allow an application for decree absolute in circumstances such as those of the present case. But I have come to the conclusion that counsel for the wife and for the King's Proctor were well founded in their submission that the jurisdiction of the court cannot be restricted or taken away by a mere alteration of the rules. It is clear that in 1892 and 1894 jurisdiction existed to pronounce decree absolute in a case such as the present, as is shown by *Moore* v. *Moore* (1) and *Rogers* v. *Rogers* (2). If the court had jurisdiction at that date, that jurisdiction could only be taken away by subsequent statutory enactment. I can find nothing in any subsequent statute which either expressly or by implication takes away the jurisdiction that was exercised in the two cases referred to. On the contrary, as I have previously pointed out, the provisions of the statutes in force today are, so far as this point is concerned, substantially the same as those in force sixty years ago.

I have come to the conclusion that, provided I am satisfied on the particular facts of this case, I have undoubted jurisdiction to allow this decree to be made absolute. The fact that the present rules of court make no provision for dealing with this sort of case is much to be deplored, but I cannot regard it as a good reason for refusing to exercise a jurisdiction which I am satisfied that I have. It is much to be hoped that, in view of what has come to light in this case, an early opportunity will be taken of reconsidering and revising the present rules.

In the meantime, in the absence of any provision in the rules, I think it right to take this opportunity to emphasize that, in cases such as the present, parties making application for decree absolute, and their professional advisers, are under a duty to make the fullest possible disclosure to the court of all material facts; and furthermore, where allegations are made which may affect the opposite party or persons not parties to the suit, notice should be served on them giving full particulars of the charges made.

In the present case I am informed that the wife's solicitors did in fact take the precaution of serving notice of this application on the husband, with a copy of her affidavit. I am satisfied that the husband has had an opportunity of rebutting the charge of desertion made against him, and that his failure to take advantage of that opportunity has been due to his recognition that he has no defence to the charge. I am also satisfied that the wife has adequately accounted for her delay in making application to have the decree made absolute—indeed the reasons for the delay reflect nothing but credit on her. In the circumstances I can see no good reason for withholding the relief sought by her, and I have therefore, as already stated, granted leave to apply for decree absolute.

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(1) [1892] P. 382.

(2) [1894] P. 161.

Application granted.

Solicitors: *Charles Russell & Co.; The King's Proctor.*

J. B. G.

In re GOVIER, DECD.

1950
Mar. 29.
Willmer J.

Probate—Will—Joint will—Conditional will—Extrinsic evidence of attendant circumstances.

A husband and wife made a joint holograph will in which it was stated: " In the event of our two deaths we hereby appoint " W. A. G. to be our executor . . . . " Certain bequests followed; but the will did not provide for the possibility of one spouse surviving the other, nor was there any bequest to such a survivor. The will was shown by extrinsic evidence to have been executed at a time when the husband and wife were living in a part of the country subject to severe bombing, and when both were impressed with the risk of being killed together by the same bomb. The wife died before her husband, without making a further will, in 1949, and the question arose whether there was an intestacy.

Held, that the will was a conditional one, and that, since the condition to which it was shown to refer, namely, the simultaneous deaths of the testators, had not been fulfilled, the document must be regarded as inoperative.

In the Goods of Hugo (1877) 2 P. D. 73, followed.

PROBATE motion.

The following summary of facts is taken from the case on motion: The deceased, Florence Theresa Squire Govier, died on January 7, 1949, leaving her surviving the applicant, her husband, Edwin Govier. There were no children of the marriage. In the belief that the deceased had died intestate, a grant of letters of administration was made to the applicant and another in February, 1949. The estate was sworn at something under 2,000*l.* It had not been administered by the date of the hearing of the motion. After the grant the joint holograph will of the deceased and her husband, dated May, 1941, was discovered. The terms of that will were as follows : " This is the last will and testament " of us Edwin Govier and Florence Theresa Squire Govier " made this 27th day of May, 1941. In the event of our " two deaths we hereby appoint W. A. Govier to be our " executor. We give and bequeath . . . ." Certain bequests followed ; but the will did not refer to the possibility of one spouse surviving the other, nor was any provision made for such a survivor. The will was signed by husband and wife and duly executed.

The applicant had attached no importance to that testamentary document because he looked upon it as only a joint temporary will to provide against the possibility of his and his wife's being killed together in an air raid. On finding the document, however, he considered it his duty to bring it to the attention of his solicitor.

The court was moved to make such declaration or order as might seem fit.

William Latey for the applicant. The document is inoperative as a will because it is subject to a condition that the testators should die together. That condition has not been fulfilled. It is true that neither the word " together " nor words to that effect appear in the conditional phrase, but where there is doubt as to the meaning of a phrase the court is entitled to accept evidence of a testator's intention : *In the Goods of Bryan* (1). The applicant had stated in his affidavit that both he and his wife had attached no importance to the document after the end of the war, since they only intended it to be effective if they were killed together by the same bomb. They considered the document inoperative, but had forgotten to destroy it. Since his wife's death, the applicant had, indeed, made another will.

The nearest case on the facts is *In the Goods of Hugo* (2), in which a married couple about to make a railway journey soon after the news of a serious railway accident executed a joint will " in case we should be called out of this world at one and " the same time, and by one and the same accident." Sir James Hannen held that the will was dependent on a contingency which did not happen and which was therefore inoperative. The words in that case were, of course, unambiguous, while the words here raise a doubt upon which extrinsic evidence is necessary in order to prove the contingent intention.

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(1) [1907] P. 125, 130.

(2) (1877) 2 P. D. 73.

Marshall-Reynolds for the beneficiaries named in the joint will. It is not admitted that the joint will is a conditional will, and this is borne out by certain testamentary intentions which were expressed by the deceased. [He referred to *In the Goods of Spratt* (1) in which the cases on conditional wills were reviewed.]

Willmer J. In my judgment this document is a conditional will. The use of the phrase " in the event " imports that the operation of the document is to be contingent on the happening of the event referred to. The difficulty to my mind is to determine what is the condition to which the document refers. The words used are " in the event of our two deaths." Human life being what it is, it is possible to construe those words as merely referring to something which in the ordinary course of events is bound to happen some day ; but I cannot think that, if that is all that was intended by the phrase, the persons who executed the will would have troubled to include it.

It is conceded that, in view of the ambiguity of the phrase, I am entitled to look to extrinsic evidence of the attendant circumstances. That evidence shows that at the time in question, when this document was executed, the county of Devon, where the parties were then living, was subject to severe bombing attacks ; and the applicant's affidavit makes it clear that one of the things which had impressed itself on his mind, and on the mind of the deceased, was the risk to which ordinary people were subjected of being killed together by the explosion of the same bomb.

In addition to that extrinsic evidence, I am indeed bound to look at the provisions of the document as a whole with a view to construing the phrase used. Reading the document as a whole, and bearing in mind the context in which, according to the extrinsic evidence which has been tendered, it was

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(1) [1897] P. 28.

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GOVIER, DECD., *In re.*

Willmer J.

executed, I feel that there can be no doubt that the condition intended by the parties to the document was the event of their two deaths being caused simultaneously by one and the same bomb or by other wartime mischance.

If that is the true construction of this document, its effect is the same as that of the document in *In the Goods of Hugo* (1), to which counsel referred. In that case the condition was accurately and precisely defined by the terms of the will. Here, as I have said, it was ambiguously stated; but the effect of the construction which I put on the words used is such as to bring the effect of this document within the same rule as was applied in *In the Goods of Hugo* (1).

The condition referred to, namely, the simultaneous deaths of these two persons, has not occurred—one of them has since died through natural causes and the other is still alive. In those circumstances, the condition not having been fulfilled, it appears to me that the document must be regarded as wholly inoperative.

In view of the difficulties, the costs of all parties should be paid out of the estate as between solicitor and client.

Solicitors: *Coode, Kingdon, Cotton & Ward; White and Leonard for Chanter, Burrington & Foster, Barnstaple.*

(1) 2 P. D. 73.

J. B. G.

1950
Mar. 7, 8, 17.

Hodson J.

BISHOP *v.* CUNARD WHITE STAR COMPANY, LD.

APPLEBY *v.* SAME.

The Queen Mary.

Shipping—Collision—Loss of life—Claims by widow and dependants—Assessment of damages—Guiding principles in making awards—Fatal Accidents Acts, 1846 *to* 1908 (9 *&* 10 *Vict. c.* 93)—*Fatal Accidents (Damages) Act,* 1908 (8 *Edw.* 7, *c.* 7)—*Law Reform (Miscellaneous Provisions) Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 41).

In October, 1942, the steamship *Queen Mary* and H.M. cruiser *Curacoa* came into collision with the result that the *Curacoa* sank within a few minutes and some 334 naval officers and men lost their lives. In an action for negligence brought by the British Government against the owners of the *Queen Mary*, the

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v.
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WHITE STAR
CO., LD.

APPLEBY
v.
SAME.

Queen Mary was held by the House of Lords on February 8, 1949, to be one-third and the *Curacoa* two-thirds to blame for the collision. In the first of the present two cases, the plaintiff claimed damages on her own behalf, on behalf of an infant son, and as executrix of the estate of her husband, who lost his life in the collision, from the owners of the *Queen Mary*; in the second case, the plaintiff similarly claimed as a future dependent father, and as administrator of the estate of his son who died in the same circumstances. The deceased in the first case was an engine-room artificer 39 years of age and due for retirement on a pension at 40 years of age. He was a skilled craftsman, had every reason to expect well-paid employment ashore on retirement, and paid his wife 6*l.* a week for her personal and domestic needs. The registrar, on a reference to him of the question of damages, based his gross award on 15 years' purchase at 300*l.* a year, namely, 3,750*l.*, and 160*l.* for the infant son. From those sums he deducted 350*l.* awarded under the Law Reform (Miscellaneous Provisions) Act, 1934, for loss of expectation of life, 713*l.* and 76*l.*, which the widow and infant son, respectively, had already received as pensions, 100*l.*, the net amount received from the husband's estate, and 85*l.* received as special damages. Those deductions left a net amount of 2,502*l.* awarded under the Fatal Accidents Acts.

The case of the plaintiff in the second action was that his son, an ordinary seaman, was 19½ years of age at the time of his death, was unmarried, and, ordinarily, would have lived with his parents and contributed generously; that in civil life he was a bank clerk and that his prospects of advancement on resuming his civil occupation were very favourable; and that, though neither the plaintiff nor his wife was dependent on their son at the time of his death, they relied on him for financial help in their old age, and especially in case the plaintiff's wife should survive him and her circumstances become reduced in consequence. The registrar awarded a gross sum of 1,400*l.*, from which he deducted 500*l.* awarded for loss of expectation of life, 147*l.* in respect of the son's estate, and 42*l.* as special damages. Those deductions left a net amount of 711*l.* awarded under the Fatal Accidents Acts. The plaintiff and defendants in each case made objection to certain items in the respective awards. Rulings by the court were sought as guidance in the assessment of damages in a large number of similar cases pending. Hodson J. laid down the following rules:

(1.) In considering the measure of damages, the discretion is that of the judge who will, however, according to the established practice, not feel compelled to form an independent view on questions of quantum but rather will rely on the skill and experience of the registrar.

(2.) Having regard to the principles laid down by Lord Simon in *Benham* v. *Gambling* [1941] A. C. 157, 166, for the assessment of damages for loss of expectation of life under the Law Reform (Miscellaneous Provisions) Act, 1934, and in particular to his observations that age was not so much to be valued as the prospect of a predominantly happy life, the measure of damages where persons in the prime of life are concerned does not vary with the number of years of the allotted span remaining to the individual in respect of whom the claim is made. Accordingly, the registrar was in error in making a distinction between the two men (aged 39 and 19½ years respectively) on that ground alone.

(3.) No award should be made on the ground of pain and suffering in the absence of clear evidence of reasonably prolonged suffering. Accordingly the registrar was right to make no award in a case where death occurred suddenly.

(4.) In assessing damages under the Fatal Accidents Acts, 1846 to 1908, it is convenient to start with a sum calculated in accordance with the principles enunciated by Lord Wright in *Davies* v. *Powell Duffryn Associated Collieries Ld.* [1942] A. C. 601. The calculation is made by taking the amount of the wages which the deceased was earning at the date of death, from which must be deducted an estimated sum for his own personal and living expenses, the balance then being multiplied by a certain number of years' purchase, which number should not be materially reduced in the present cases by reason of the hazardous nature of the occupation of the two men in question. The basic result should be subjected to the element of reasonable future probabilities, as, for instance, that the widow might marry again and cease to be dependent. When the necessary deductions from the starting sum have been made, the resulting total should be apportioned among the members of the family when claims are made in respect of more than one dependant. The prospect of higher wages ashore had to be discounted to some extent by the greater expense which had to be faced there as compared with the lesser expense incurred by the two men in a seafaring life; and high wages were, in themselves, to be taken as discounted to a great extent by the incidence of income tax.

(5.) Deductions should be made from the basic sum in respect of (*a*) the award for loss of expectation of life to be deducted pound for pound; (*b*) pain and suffering (where any sum was awarded under that head); (*c*) the value of lost personal property; and (*d*) the value of the deceased's estate. In (*c*) and (*d*) the values will not be deductible pound for pound: where the estate included a freehold house jointly occupied by the wife and husband, its value should not be taken into account.

(6.) Policies of insurance and death payments by benefit societies are excluded from account by the Fatal Accidents (Damages) Act, 1908, and should not be deducted.

(7.) Pensions and school fees already received should be deducted, but not in full where there has been an increase to meet the increased cost of living. Pensions reasonably to be anticipated for future years should also be deducted.

Two motions in objection to the registrar's reports.

In an action brought by the Admiralty Commissioners

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against the Cunard White Star Company, Ld., the steamship *Queen Mary* was held to be one-third, and the cruiser H.M.S. *Curacoa* two-thirds, to blame for a collision which occurred between the two ships on October 2, 1942, as a result of which the *Curacoa* was sunk and some 334 officers and men of the Royal Navy lost their lives. In consequence of that decision, Mrs. Barbara Mary Bishop, the widow of Philip Keith Bishop, an engine-room artificer on board H.M.S. *Curacoa*, who lost his life in the collision, brought an action against the owners of the *Queen Mary*, claiming damages for negligence under the Fatal Accidents Acts, on her own behalf, and on that of her infant child, and under the Law Reform (Miscellaneous Provisions) Act, 1934, as executrix of the estate of her husband, for loss of expectation of life. The defendants admitted liability, and the question of damages was referred to the registrar.

The second action arose out of the same circumstances. The plaintiff, Harold James Appleby, sued on his own behalf and as administrator of the estate of his son Denis, who lost his life in the collision while serving as an ordinary seaman on H.M.S. *Curacoa*.

The facts are fully set out in the judgment.

Nelson K.C. and *Sven O. Olsen* for the defendants. The purpose of these motions is to attempt to have settled the principles to be applied in the assessment of damages in some 334 cases which will arise out of the same circumstances as the two now before the court, and the basis on which they should be considered. The claims are made under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934. It is clear, on the authorities, that awards under the Fatal Accidents Acts are limited to the actual pecuniary loss suffered by the dependants. The method of assessment is well established in these courts and has regard to the amount of money which the deceased had contributed to the household concerned and the number of years' purchase which ought to be allowed in respect of that loss. Damages must not be given on an annuity basis. Fifteen years' purchase represents the maximum. The registrar has not taken into consideration that the deceased persons were engaged in a hazardous occupation.

[Hodson J. The risks attendant on a state of war are liable to affect everybody.]

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There are factors on the other side usually to be deducted from the estimated loss: (*a*) any estate left by the deceased; (*b*) value of personal effects lost; (*c*) the amount of the award for loss of expectation of life under the Law Reform (Miscellaneous Provisions) Act, 1934; and (*d*) any award made in respect of pain and suffering. The registrar has made no award under head (*d*), and rightly so, for no award should be made where death has ensued on the same day as the accident.

The award must be assessed as at the date of the loss. [*Davies* v. *Powell Duffryn Associated Collieries Ld.* (1) referred to]. The damages awarded by the registrar under the Fatal Accidents Acts and under the Law Reform (Miscellaneous Provisions) Act, are excessive and unreasonable. The registrar misdirected himself in law and applied wrong principles of law in assessing the amount of damages. There was no evidence to support his findings. In particular, any sum over 350*l.* for loss of expectation of life was too high.

[*Rose* v. *Ford* (2) and *Flint* v. *Lovell* (3) referred to.]

Glyn Jones K.C. and *Vere Hunt* for the claimants. Nothing has been said as to the grounds on which the judge would set aside or interfere with the registrar's awards. Willmer J., in *The Swynfleet* (4) would not set aside an award for a mere difference of opinion. Counsel for the defendants cannot ask the court to go beyond what Lord Simon said in *Benham* v. *Gambling* (5). He cannot contend that a young man is not entitled to more damages for loss of expectation of life than an old one: the expectation of life of all sailors irrespective of age is X pounds.

The registrar was wrong in not making an award under the head of pain and suffering: he flew in the face of all probabilities by holding that there was no evidence of it. In making an award under the Fatal Accidents Acts the test is what sum of money would enable the claimant (a widow) to maintain herself in the standard of life in which her husband would have been able to maintain her? It cannot be conceded that any pension which will be paid by the Admiralty should be deducted pound for pound. Any pension is at the discretion of the Government: it may cease or be reduced. The registrar was wrong in deducting the whole of the value of the personal estate in the case of Bishop. It is impossible for the court

(1) [1942] A. C. 601.

(2) [1937] A. C. 826.

(3) [1935] 1 K. B. 354.

(4) (1948) 81 Ll. L. Rep. 116.

(5) [1941] A. C. 157.

to shut its eyes to what has occurred in the past seven years in regard to the cost of living and the purchasing power of money. The prospect of re-marriage in the case of a widow is one to be considered, but after the lapse of eight years that would tend to be more remote.

The case of Appleby is a pure question of quantum ; there was no ground for interfering with the registrar's estimate.

Nelson K.C. replied.

Cur. adv. vult.

Mar. 17. Hodson J., read the following judgment. The first point taken on behalf of the plaintiffs, that the discretion is that of the registrar and not that of the judge, is not, I think, open to argument in view of the approval of the decision of the Court of Appeal in *Cooper* v. *Cooper* (1) by Lord Atkin in the House of Lords in *Evans* v. *Bartlam* (2). Although the discretion is the judge's discretion, he will, however, according to the established practice, not feel compelled to form an independent view on questions of quantum, but will rather rely upon the skill and experience of the registrar who has made his report.

I will deal first with the claim under the Law Reform Act. Claims based on loss of expectation of life must be considered in the light of the decision of the House of Lords contained in the opinion of Lord Simon in *Benham* v. *Gambling* (3), which may be said to have put a brake on a tendency to award high damages under this head by reducing the damages actually awarded from 1,200*l.* to 200*l.* In considering the age of the victim of the accident, he said (4) : " . . . . the thing to be " valued is not the prospect of length of days, but the prospect " of a predominantly happy life. The age of the individual " may, in some cases, be a relevant factor. For example, " in extreme old age the brevity of what life may be left may " be relevant, but, as it seems to me, arithmetical calculations " are to be avoided, if only for the reason that it is of no " assistance to know how many years may have been lost, " unless one knows how to put a value on the years. It would " be fallacious to assume, for this purpose, that all human life " is continuously an enjoyable thing, so that the shortening " of it calls for compensation, to be paid to the deceased's " estate, on a quantitative basis. The ups and downs of life,

(1) [1936] W. N. 205.
(2) [1937] A. C. 473, 478.
(3) [1941] A. C. 157.
(4) Ibid. 166.

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"its pains and sorrows as well as its joys and pleasures—all "that makes up 'life's fitful fever'—have to be allowed for "in the estimate. In assessing damages for shortening of "life, therefore, such damages should not be calculated solely, "or even mainly, on the basis of the length of life that is lost."

Referring to the particular case, he said (1): "The main "reason, I think, why the appropriate figure of damages "should be reduced in the case of a very young child is that "there is necessarily so much uncertainty about the child's "future that no confident estimate of prospective happiness "can be made. When an individual has reached an age to "have settled prospects—having passed the risks and uncertainties of childhood and having in some degree attained "to an established character and to firmer hopes—his or her "future becomes more definite and the extent to which good "fortune may probably attend him at any rate becomes less "incalculable."

I think that the right conclusion to draw from this passage is that where men in the prime of life are concerned (as in all the claims arising from this accident) the measure of damages does not vary with the number of years of the allotted span which may be said to lie in front of the deceased persons.

I was told that the registrar had expressed the contrary view and that this was reflected in the two cases before me, because Bishop was 39 years of age when he died and Appleby was 19½—and in the former case he awarded 350*l.* and in the latter case 500*l.* If, therefore, the registrar varied the amount simply because of the difference in age of the two men, I think that he was in error. It does not, of course, follow that the figure in each case must necessarily be the same, and I would not be prepared to say that either of these figures was wrong in itself, or, in particular, that either figure is too high in the light of the judgment of the House of Lords. I do not take into consideration the fall in the value of the pound which has occurred since the judgment was given. This, no doubt, would be material if the damages had to be assessed according to the now-existing value of the pound; but, since the accident occurred in the year following the House of Lords' judgment and thereunder must be approached from the point of view of the time of the accident when the damages crystallized, this consideration does not materially affect the awards in these cases. In these two cases it makes no difference to the ultimate result whether I alter the figures awarded under this head or not, and I do not propose to make any variation.

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(1) [1941] A. C. 157, 167.

I agree with the view taken by the registrar that there is no evidence in these cases to support a claim for damages under the head of pain and suffering. It would be difficult, if not impossible, to ascertain the circumstances in which these men met their death and the length of time that each survived the accident. In the absence of clear evidence of reasonably prolonged suffering there should be no award under this head. I think that this conclusion is consistent with the view taken by the Court of Appeal in *Rose* v. *Ford* (1), confirmed on this point by the House of Lords (2). In that case the plaintiff survived the accident for four days, during the greater part of which she was in a state of coma, and damages under this head were fixed at the sum of 20*l*.

The next claim under the heading of the Law Reform Act is that for loss of personal property. The registrar has in each case slightly written down the amount claimed. This, I think, he was entitled to do in the light of his knowledge and experience, even though there was no cross-examination of either of the deponents on their affidavits, although it is right to say, as counsel for the plaintiffs contended, that there should not be anything in the nature of a flat deduction in all cases.

In assessing damages under the Fatal Accidents Acts, it is convenient to start with a sum calculated in accordance with the principles enunciated by Lord Wright in *Davies* v. *Powell Duffryn Associated Collieries, Ld.* (3). Lord Wright said: "It is a hard matter of pounds, shillings and pence, subject "to the element of reasonable future probabilities. The "starting point is the amount of wages which the deceased "was earning, the ascertainment of which to some extent may "depend on the regularity of his employment. Then there is "an estimate of how much was required or expended for his "own personal and living expenses. The balance will give "a datum or basic figure which will generally be turned into "a lump sum by taking a certain number of years' purchase. "That sum, however, has to be taxed down by having due "regard to uncertainties: for instance, that the widow might "have again married and thus ceased to be dependent, and "other like matters of speculation and doubt."

(1) [1936] 1 K. B. 90.
(2) [1937] A. C. 826.
(3) [1942] A. C. 601, 617.

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The number of years' purchase is left fluid, but I do not think that that number is to be materially reduced in these cases by consideration of the hazardous nature of the occupation of the deceased men. During the last great war the hazards of life at sea were not conspicuously greater than risks run by many other persons on shore.

When the necessary deductions from the starting sum have been made, the resulting total should be apportioned amongst the members of the family when claims are made in respect of more than one dependant. This practice is in accordance with the decision of the Court of Appeal in *Johnson* v. *Hill* (1), and should, as a matter of convenient practice, be followed in these cases.

Deductions have to be made in respect of sums awarded under the Law Reform Act for loss of expectation of life, for pain and suffering, and also for loss of personal effects, unless, for example, these consist of articles of which a widow claimant would have had the use when her husband was at home. In other words, personal effects are not automatically to be deducted pound by pound any more than the value of the deceased's estate should be so deducted: the estate may consist in the main of a house and furniture, of which the widow claimant continues to enjoy the use after the death as before, and no deduction will be made in this respect. Sums paid or payable under policies of insurance are excluded from account by the Fatal Accidents (Damages) Act, 1908.

Where stocks and shares and comparable income-producing investments are concerned, and the probable family interest is thereby accelerated, the deduction will normally be made in full. To take the extreme case where the whole family income is derived from the husband's investments, the widow who takes his whole estate on his death will have no claim under the Fatal Accidents Acts. The starting sum will in each case be an inexact sum, and exactly calculated deductions cannot normally be made. Damages for loss of expectation of life will be deducted pound for pound, but in their essence are themselves inexact sums. The rights of widows and children to pensions must be taken into account.

In *Baker* v. *Dalgleish Steam Shipping Company* (2), the principle is thus stated shortly by Scrutton L.J.: "Just "as in assessing the loss by the death the probability of

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(1) (1945) 61 T. L. R. 398. (2) [1922] 1 K. B. 361, 372.

" voluntary contribution destroyed by the death of the con-" tributor may be included to swell the claim, so the prob-" ability of voluntary contribution bestowed in consequence " of the death may be used to reduce the claim by showing " what loss the claimant has in fact sustained by the death."

When the assessment of damage, as here, has been delayed, it is impossible to shut one's eyes to what has actually happened by way of payment of pensions and other sums of a like nature, since, although the damage is to be assessed as at the time of the accident, what was then uncertainty has been turned into certainty in so far as money has been received by claimants. The total payment received is, again, however, not a matter of exact deduction, since pension rates have been raised since the time of the accident to meet the increased cost of living. Accordingly, the starting total being based on figures for 1942, increases attributable to the higher cost of living since that date are not properly deductible pound for pound. On the other hand, the amounts actually paid do not represent the limit of deduction in cases where the number of years' purchase taken into account in arriving at the starting sum is greater than the number of years in respect of which pension has been paid.

There is in these cases a reasonable expectation of the continuance of the pension for the unexpired period of the number of years taken. Pensions are subject to variation in the light of awards given, but the present practice is set out in a letter from the Treasury Solicitor, which was before the registrar. This, in the case of a widow, is to disregard the first 10 per cent. of the award, or 50*l*., whichever is the greater, and to convert the balance of the award in to a notional annuity which is deducted from the pension, but so that in certain cases the minimum pension is fixed at 30*s*. a week and in the others at 20*s*. a week.

Applying these considerations to the two cases under review, I will first deal with the case of Chief Petty Officer Bishop, reported as follows: " At the time of his death Chief Petty " Officer Bishop was 39 years of age. He had joined the " Navy on January 24, 1920, intending to make it his career, " and, had he survived, he would have become entitled to " a pension in 1943. As a result of the death of her husband, " the widow was compelled to work to supplement her pension, " and her son left school earlier than he would otherwise have " done, in the praiseworthy desire to ease the burden cast " on his mother. The mother got work as a telephonist at

"4*l.* a week, and the son, at the age of 15½, entered the bakery "trade as a learner at 2*l.* 9*s.* 0*d.* a week, of which he contributed 1*l.* a week until his marriage in May, 1949. The "contribution of the deceased to his wife and son was about "6*l.* a week, or, roughly, 300*l.* a year. On retirement at the "end of the war, the deceased, who was a highly skilled craftsman with a very creditable record in the Navy—(apart "from his technical efficiency he was mentioned in dispatches) "—would certainly have got employment ashore with a high "rate of pay, in addition to his pension. He would have "been only 42 at the end of 1945, and, with his qualifications, "would, in the normal course, have had many years of remunerative work before him. His income would have been such "that his wife might look forward to receiving much more "than 6*l.* a week."

The registrar considered that an award might be based on 15 years at 5*l.* a week: that is to say, 1*l.* a week less than the contribution which he had made to the family.

Counsel for the defendants very fairly conceded that if I accepted the evidence of the widow that contribution had been made at the rate of 6*l.* a week it would be reasonable to take a number of years' purchase (say 12) of this figure. This number would lessen pro tanto the amount of anticipated pension to be taken into consideration, but would not materially affect the starting sum. Counsel for the plaintiff argued that the starting sum was itself too low. He contended that the approach based on the answer to the question: "What "contribution did the deceased make?" is wrong, and submitted that a sum of money should be estimated which would enable the widow to maintain herself in that state of life to which she was used, or which she might expect. He argued in this connexion that the starting sum did not differentiate sufficiently the present case from the common one of a wage-earner without any reasonable prospect of improving his position.

It appears, however, from the language of the report which I have read that the registrar took into account the civilian prospects of the deceased, and I think that this consideration is properly reflected in the starting sum of 3,750*l.* reached by him. The prospect of higher wages on shore has to be discounted to some extent by the greater expense which has to be faced there as compared with the lesser expense incurred in a seafaring life. Moreover, high wages are in themselves discounted to a great extent by the incidence of income tax.

I see no reason to disagree with the starting sum of 3,750*l.*

From this amount deductions have to be made in respect of pension. Although the figure of 713*l.* representing pension actually paid, including, as it does, cost-of-living increases, is too large to be deducted in full, yet (taking 12 years' purchase) payments of reasonably anticipated pension at 30*s.* a week, to be made in the four years still remaining, 76*l.* pension paid in respect of the son, and the school fees paid by the Ministry of Pensions, which I was informed amounted to 110*l.* in all, should be taken into consideration. I therefore deduct 1,000*l.* in this respect in place of the two sums of 713*l.* and 76*l.* deducted by the registrar.

I agree with the deduction proposed of 85*l.*, the amount awarded as special damage, and of 350*l.*, the amount awarded in respect of loss of expectation of life under the Law Reform Act.

There remains the question of the deduction, if any, to be made in respect of the estate of the deceased, which was taken as 100*l.* This matter has been clarified by a letter dated February 2, 1950, written after the date of the report and attached to the record, which shows that the deceased's estate was of the value of 761*l.* Since the estate consisted almost entirely of a freehold house, where he lived with his wife, and a Benefit Society death payment excluded by the Fatal Accidents (Damages) Act, 1908, no deduction should be made under this head.

I therefore substitute 2,315*l.* for the 2,502*l.* recommended by the registrar, to be apportioned between the widow and the infant son as follows: to the widow, 2155*l.*; to the son 160*l.*

In the case of Appleby, the defendants do not deny that the plaintiff is entitled to some damage under the Fatal Accidents Acts, but contend that the dependency is very limited in his case and may never arise having regard to the circumstances of the family, including the existence of another son who is a potential contributor, and to the fact that the two parents were in receipt of a pension adequate to their needs. On the other hand, it is contended that the question is one of mere quantum: that the deceased had made a high contribution to his parents, and that the amount awarded was fairly based on the prospects of the particular youth.

The facts are thus summarized in the report of the registrar: "Denis Appleby, who was born on May 16, 1923, was serving "as an ordinary seaman at 3*s.* 6*d.* per day on board the "*Curacoa*, and lost his life as a result of the aforesaid collision "on October 2, 1942, and was thus at his death 19½ years old.

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"He had been educated at the Henry Mellish County Secondary "School, Nottingham, and, in July, 1939, had passed his "school certificate examination. Thereafter he entered into "the employ of the Midland Bank at Nottingham as a clerk, "and at the time of his call-up to the Navy was receiving "97*l.* 10*s.* per annum. He lived at home with his parents "and out of his salary contributed 72*l.* per annum to the "household. Before being called up he had passed part of "the Institute of Bankers' examination. Had he survived "he would now be receiving a salary of about 400*l.* per annum. "The plaintiff, the father of the deceased, had been in the "employ of the Post Office at a gross salary of 525*l.* a year "until he retired on December 21, 1946, on a pension of 270*l.* "per annum. This pension is his sole means of support; he "has no naval pension in respect of the death of his son. The "plaintiff is now 62 years old and his wife 67. At the time "of the death of their son the plaintiff and his wife were not "dependent upon him, but they relied upon his assurance to "help them financially in their old age."

This is, as the registrar found, a problem of difficulty, but I have come to the conclusion, on consideration of these facts and estimates, that the amount of estimated contribution is so much too high that the court should vary the figure recommended in the report. The registrar has not, I think, sufficiently taken into account the fact that if the deceased man were living at home he would be making part of his contribution in respect of his own keep. If, on the other hand, he were living away from home, even unmarried, his contribution would not be expected to be nearly as high as 150*l.* a year out of his total anticipated income.

I have come to the conclusion, particularly having regard to the limited nature of the dependency, that the starting sum of 1,400*l.* in this case should be reduced to 750*l.*

From this sum of 750*l.* must be deducted the sums of 500*l.*, 147*l.* and 42*l.* referred to in the report, making a total award under the Fatal Accidents Acts of 61*l.*

With the variations indicated, I confirm the reports in each case, the interest to run from the date of the awards.

Reports varied.

Solicitors: *Botterell & Roche; Hill, Dickinson & Co.*

H. G.

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Husband and wife—Divorce—Nullity—Husband's insistence on coitus interruptus—Whether wilful refusal to consummate the marriage—Coitus interruptus as cruelty—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 176 (*c*)—*Matrimonial Causes Act*, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 57), *ss.* 2, 7, *sub-s.* 1 (*a*).

It is not essential to the consummation of a marriage that in addition to penetration there should be an emission within the body of the wife. Where, therefore, a husband has practised coitus interruptus against the wishes of his wife, and has invariably withdrawn from her body before emission, he cannot be said on that account to have wilfully refused to consummate the marriage.

Although no opinion was expressed by the House of Lords in *Baxter* v. *Baxter* [1948] A. C. 274, upon coitus interruptus, as distinct from artificial methods of contraception, the effect of that decision was to leave this question, which had previously been determined by the Court of Appeal in *Cowen* v. *Cowen* [1946] P. 36, open; for the decision of the Court of Appeal in that case was based upon an interpretation of *D.* v. *A.* (1845) 1 Rob. Ecc. 279, which the House of Lords held to have been mistaken.

Baxter v. *Baxter* [1948] A. C. 274; *D.* v. *A.* (1845) 1 Rob. Ecc. 279, applied. *White* (*orse. Berry*) v. *White* [1948] P. 330, followed. *Cowen* v. *Cowen* [1946] P. 36, in the light of *Baxter* v. *Baxter* (supra) and *Grimes* (*orse. Edwards*) v. *Grimes* [1948] P. 323, not followed.

Per curiam: The court would be driven into an impossible position if it tried further to define what amounted to normal sexual intercourse between normally formed people; for where, for example, a woman alleged that her husband had failed to complete the sexual act, the court would be bound to embark on a variety of intimate physiological questions.

The practice of coitus interruptus may, however, amount to cruelty, and, on the facts of the instant case, the wife was entitled to a decree of divorce.

UNDEFENDED petition for nullity, or, in the alternative, dissolution of marriage.

The following statement of the facts is taken from the judgment.

The parties were married in 1935, and throughout the married life, which continued until 1947, the husband practised coitus interruptus. Evidence was given by the wife that coitus interruptus was the only form of sexual intercourse which had taken place, and that this was against her wishes. There had been emissions subsequent to withdrawal, some of which had been against the wife's body. Evidence (by

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affidavit) was given in corroboration by a doctor, whom the wife had consulted. He knew her before her marriage, when she was in exceptionally good health; but after her marriage her health had deteriorated, and, as a result of inquiries which he made of her, he spoke to the husband in 1943. The doctor said in his affidavit: " I told him that his wife had said to " me that throughout their married life he would insist on " practising coitus interruptus. I warned him that if he " continued this incomplete intercourse his actions would " result in a complete breakdown of her health. The husband " did not even attempt to deny that he practised coitus " interruptus, but said that he did so because he could not " allow his wife to have any family as her parents were first " cousins . . . . I did my best to bring home to the husband, " the effect his attitude was having upon the wife's health; " but I failed to convince him that his point of view was a " selfish one, and harmful to the wife. During our conversation " I asked the husband if he would be willing to have normal " intercourse with the use of contraceptives. His reply was " to the effect that he did not trust them to be fully effective " and [he] said he would not alter his methods."

The doctor thus described how he saw the wife shortly before the separation: " The wife was clearly under a nervous " strain. I had a long talk with her and advised her for the " sake of her health to leave her husband, at any rate for the " time being. Some time later the husband had a conversation with me during which he informed me that he had " asked the wife to return to him and that she had refused " to do so unless he promised to have normal intercourse and " he had refused to make such a promise."

Tolstoy for the wife. As for the issue of wilful refusal to consummate the marriage, the matter is still covered by *Cowen* v. *Cowen* (1), which was not, it is submitted, overruled by *Baxter* v. *Baxter* (2) on the question of coitus interruptus. [Passages (3) from both cases were read. *White* v. *White* (4) was cited and the possibility of conception, which Willmer J., considered in his judgment (5), referred to.]

The test of consummation is not conception—there may indeed be conception without consummation, as in cases of

(1) [1946] P. 36.
(2) [1948] A. C. 274.
(3) Ibid. 279, 282, 283, 286, et seq.; [1946] P. 36, 39.
(4) [1948] P. 330.
(5) Ibid. 337.

fecundatio ab extra—but whether there has been a natural complete intercourse.

[HODSON J. : How is it possible to define " natural complete " intercourse ? "]

I rely on the definition in *Baxter* v. *Baxter* (1) that " Parlia" ment used the word ' consummate ' as that word is " understood in common parlance " and on the definition (in respect of the male) of erection, penetration and emission.

[HODSON J. : It would be a matter of great difficulty if the courts had to consider precisely at which point emission took place.]

[*Grimes* v. *Grimes* (2) ; *G.* v. *G.* (3) ; s. 18 of the Offences against the Person Act, 1828; *D.* v. *A.* (4) ; Coote's Ecclesiastical Practice (1847), at pp. 374 and 385 ; Shelford on Marriage and Divorce (1841), at p. 202, and Paris and Fonblanque Medical Jurisprudence vol. 1 (1823), at pp. 197 and 204, referred to.]

HODSON, J., stated the facts as above set out, said that he would have required the assistance of the King's Proctor before reaching a decision favourable to the wife on the issue of wilful refusal, and continued : It is necessary to consider how far the possibility of conception is relevant. That matter was considered by Willmer, J., in *White* (*orse. Berry*) v. *White* (5) where he said—" I should state that in " the case before me there is evidence from Dr. McLean that, " when coitus interruptus is practised, the possibility of " conception none the less remains, and for this reason. According " to him, many men do in fact have a small emission of semen " before the main emission that follows upon the completion " of the act. There is always the possibility, therefore, that " from this minor preliminary emission conception may result. " Dr. McLean in fact said that, speaking as a medical adviser, " he would not recommend the practice of coitus interruptus " as a means of birth control. That may or may not be of " some materiality."

I mention that aspect of the case because on the evidence before me I could not find otherwise than that penetration was effected, and that, wherever it was that emission took place, there was a possibility of conception.

(1) [1948] A. C. 274, 290.
(2) [1948] P. 323.
(3) (1871) L. R. 2 P. & M. 287, 291.
(4) (1845) 1 Rob. Ecc. 279.
(5) [1948] P. 330, 337.

Coitus interruptus was considered in two cases which were tried within three days of one another. *Grimes* (*orse. Edwards*) v. *Grimes* (1), a decision of Finnemore, J., was the first case; the second was *White* (*orse. Berry*) v. *White* (2), to which I have just referred. Finnemore, J., came to the conclusion that coitus interruptus might amount to wilful refusal to consummate the marriage; Willmer, J., decided to the contrary.

That naturally puts me in a position of some embarrassment. I do not propose to follow out the judgments in detail. I will however observe that Finnemore, J., came to the conclusion in favour of the wife petitioner in an undefended case, without hearing any argument at all on the other side, whereas Willmer, J., reached his decision after hearing argument on both sides; and decisions arrived at in the former circumstances are usually of less validity than decisions arrived at after full argument.

Willmer, J., came to the conclusion that, although the point was left open in *Baxter* v. *Baxter* (3), the right conclusion, following upon the reasoning of the House of Lords, was that in circumstances of this kind it was impossible to hold that there was no consummation of the marriage. Speaking for myself, I prefer to follow that decision.

The matter has not been left there by Mr. Tolstoy, who has argued his case with very great care and has been of great assistance to me in referring to some of the authorities. He contended that the effect of the decision of the House of Lords in *Baxter* v. *Baxter* (3) was to leave this question concluded in his favour by the decision of the Court of Appeal in *Cowen* v. *Cowen* (4), and not to leave it open. The passage from *Baxter* v. *Baxter*, on which he relies, is as follows (5): "I wish to make an observation on one practice referred to in "this summary of facts, namely, that of withdrawal before "emission, or coitus interruptus. This practice, as distinct "from artificial methods of contraception, does not arise in "the case before the House and I prefer to express no opinion "about it. I desire also to reserve the question as to what "bearing the employment of force or fraud may have on the "issue of consummation."

The question to be determined therefore is to what extent the decision in *Cowen* v. *Cowen* (4) was affected by *Baxter* v. *Baxter* (3). It is necessary to consider how this particular

(1) [1948] P. 323.

(2) Ibid. 330.

(3) [1948] A. C. 274.

(4) [1946] P. 36.

(5) [1948] A. C. 274, 283.

matter of coitus interruptus is dealt with in *Cowen* v. *Cowen* (1). du Parcq, L.J., said in his judgment in that case (2): "In "order that intercourse should be complete, it is well "established that there must be what Dr. Lushington referred "to as 'vera copula.' 'Sexual intercourse,' he said, 'in the "'proper meaning of the term, is ordinary and complete "'intercourse; it does not mean partial and imperfect inter-"'course (see *D.* v. *A.* (3)). We are of opinion that sexual "intercourse cannot be said to be complete when a husband "deliberately discontinues the act of intercourse before it "has reached its natural termination,"—that is coitus interruptus—"or when he artificially prevents that natural "termination, which is the passage of the male seed into the "body of the woman," that is, by using contraceptives, the subject of the appeal to the House of Lords in *Baxter* v. *Baxter* (4). du Parcq, L. J., continues: "To hold otherwise "would be to affirm that a marriage is consummated by an "act so performed that one of the principal ends, if not the "principal end, of marriage is intentionally frustrated."

In the House of Lords the whole basis on which this conclusion in *Cowen* v. *Cowen* (1) was reached was, in my opinion, removed. Viscount Jowitt, L.C., examined *D.* v. *A.* (3) in some detail, and he made it clear that Dr. Lushington was referring in the passage which has been quoted to malformation, which was the subject matter of that case. At that time, under the law which Dr. Lushington was administering, either malformation or frigidity, or some other defect which involved an incapacity to consummate the marriage, was ground for a decree of nullity at the instance of one or other of the spouses.

In 1947, when *Baxter* v. *Baxter* (4) was decided, an additional ground for a decree of nullity had been introduced by the Matrimonial Causes Act, 1937, which gave a spouse a right to a decree of nullity on the basis, quite apart from capacity, that the opposite spouse had refused to consummate the marriage.

The question under consideration in *Baxter* v. *Baxter* (4) and *Cowen* v. *Cowen* (1) was whether on the facts of those particular cases those spouses who were charged could be said to have wilfully refused to consummate the marriage. Viscount

(1) [1946] P. 36.
(2) Ibid. 36, 40.
(3) 1 Rob. Ecc. 279, 298.
(4) [1948] A. C. 274.

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Hodson J.

Jowitt, L.C.'s, speech in *Baxter* v. *Baxter* (1) makes it plain that the House considered that the Court of Appeal had completely misapprehended the effect and the meaning of Dr. Lushington's words. It was pointed out (2) that "the "key to Dr. Lushington's judgment is that he thought the "true distinction lay in the answer to the question whether "the malformation was incurable not as related to conception "but as to the mere coitus." Since the whole foundation of the conclusion arrived at by the Court of Appeal was destroyed, in my judgment the conclusion also is destroyed, and the matter is in the fullest sense of the word left open; that is to say, it is no longer covered by the decision of the Court of Appeal in *Cowen* v. *Cowen* (3), although the House of Lords have not determined the particular point.

In my judgment, therefore, it is my duty to decide this question in the light of such authority as there is, including the judgment in *Baxter* v. *Baxter* (1) in so far as it throws light on this particular problem. I therefore come back to the reasoning of Willmer, J., with which I am in agreement, and to his analysis in *White* (*orse. Berry*) v. *White* (4) of the decision of Dr. Lushington in *D.* v. *A.* (5).

I have been invited by Mr. Tolstoy to come to the opposite conclusion because, he has contended, it is the duty of the court to find wilful refusal where consummation, "as that word "is understood in common parlance and in the light of social "conditions known to exist," has not taken place. Counsel was quoting from *Baxter* v. *Baxter* (6), and he said that where there are conditions such as these it is not possible to hold that normal sexual intercourse has taken place, and that if normal sexual intercourse has not taken place owing to the refusal of the husband then there has been a wilful refusal by him to consummate the marriage.

It is my opinion that the court would be driven into an impossible position if it tried further to define what amounted to normal sexual intercourse between normally formed people: for, where a woman alleged that the man had failed to complete the sexual act, the court would have to inquire exactly at what stage emission took place, or what degree of satisfaction was reached by the woman.

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(1) [1948] A. C. 274.
(2) Ibid. 288.
(3) [1946] P. 36.
(4) [1948] P. 330.
(5) 1 Rob. Ecc. 279.
(6) [1948] A. C. 274, 290.

I have already indicated the difficulties in this particular case of examining or trying to draw the line between a complete act and an incomplete act. Here seed was emitted from the man in close proximity to the woman, and the woman might have conceived. I, for my part, must decline to embark on an inquiry of a kind which I think it would be almost impossible to complete.

It is submitted by Mr. Tolstoy that that is no reason why the court should not embark on that inquiry, because it has to embark on difficult inquiries in every case where capacity is in question. That is true, but in cases where capacity is in question the court expects assistance from expert witnesses who can give evidence as to physical facts which will give guidance to the court on a subject such as this where there is often no possibility of corroboration being available. It seems to me that it is impossible to determine exactly where normal intercourse begins and ends; there could be no legal standard laid down which would define a matter of that kind.

I have not forgotten that I have been referred to a passage in Shelford on Marriage (1841), p. 202: " Impotence then " consists in the incapacity for copulation, or in the impossibility " of accomplishing the act of procreation. The manifest " causes of impotence in both sexes are divided into physical " and moral. The causes of impotence in man arise from " two sources, from malformation of the genitals or from want " of action in them; but in females impotence can only depend " on malformation, either natural or acquired."

It is contended that it appears to have been thought that an essential part of the act of intercourse was the emission of seed into the body of a woman. In that connexion I was further reminded that at common law, before the Offences Against the Person Act, 1828, the emission of seed was an essential part of the evidence in criminal cases where carnal knowledge was involved.

Without knowing of any reported cases where the emission of seed in criminal cases is concerned, it is impossible to determine how far the evidence of what happened to the seed would be considered relevant; but so far as cases of impotence are concerned I have the advantage of the authority of Dr. Lushington in *D.* v. *A.* (1), to which I have not yet referred directly, from which it is clear that the question of conception, or the possibility of conception, as opposed to the possibility

(1) 1 Rob. Ecc. 279.

of penetration, was not considered material. Dr. Lushington said (1): "Mere incapability, however, of conception is not "a sufficient ground whereon to found a decree of nullity, and "alone so clearly insufficient, that it would be a waste of time "to discuss an admitted point. The only question is, whether "the lady is or is not capable of sexual intercourse, or, if at "present incapable, whether that incapacity can be removed."

Counsel referred in the course of his argument to the judgment of Lord Penzance in *G.* v. *G.* (2), and particular reliance was placed on the following passage (3): "It is "conceded that if the organs of the woman were so formed "structurally as to render intercourse impossible, the marriage "would be void. It is apparent enough that without sexual "intercourse the ends of marriage, the procreation of children, "and the pleasures and enjoyments of matrimony cannot be "attained." I do not think that that passage goes so far as to support the view which I am asked to take, that sexual intercourse cannot be said to have taken place unless there has been an emission within the body of the woman in addition to penetration. The pleasures and enjoyments of matrimony referred to in *G.* v. *G.* (2) are independent of the act of sexual intercourse which is referred to in the earlier part of the sentence; and the reference to the procreation of children as one of the ends of matrimony does not in my opinion carry the argument any further. That is particularly so in a case such as this, where the possibility of pregnancy is by no means absent.

For these reasons I hold that the claim for a decree of nullity fails. The claim for divorce, however, succeeds on the ground of cruelty, for I find that the conduct of the husband to this woman can properly be described by the English word "cruel" in its ordinary meaning, having regard to her repeated protests at this particular form of maltreatment, which was persisted in notwithstanding those protests, which affected her health, and which caused reasonable apprehension of further injury to her health if she had continued to live with him. Indeed after they had parted the wife gave her husband a further opportunity of restoring the position by leading a normal married life and by behaving towards her sexually in what might reasonably be described as a normal manner; and from that point of view the case is covered by these words

(1) 1 Rob. Ecc. 286.
(2) L. R. 1 P. & M. 287.
(3) Ibid. 291.

in the speech of Viscount Jowitt L.C., in *Baxter* v. *Baxter* (1): "I take the view that in this legislation Parliament used the "word 'consummate' as that word is understood in common "parlance and in light of social conditions known to exist, "and that the proper occasion for considering the subjects "raised by this appeal is when the sexual life of the spouses, "and the responsibility of either or both for a childless home, "form the background to some other claim for relief." He obviously had in mind then relief based either on desertion or on cruelty.

The evidence of the wife has been corroborated, as I have already indicated, by the evidence of the doctor, and I find her allegation of cruelty proved. I reject the prayer for nullity, and there will be a decree of divorce on the ground of cruelty, with costs.

Decree nisi of divorce

Solicitor: *Miss P. G. Topham, The Law Society, Services Divorce Department.*

J. B. G.

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(1) [1948] A. C. 274, 290.

DEMETRIOU *v.* DEMETRIOU.

C. A.

1950 *May* 4, 5.

Asquith and Jenkins L.JJ.

Husband and wife—Divorce—Wife's petition for cruelty—Cross petition by husband for desertion—Application by wife to file second petition alleging desertion while first petition still on file.

While a petition for divorce is on the file, the court will not give leave to the petitioner to file a second petition.

Onslow v. *Onslow* (1889) 60 L. T. 680 considered.

APPEAL from Willmer J.

On September 27, 1943, the appellant wife was married to the respondent, and they separated in July, 1946. On May 26, 1949, the wife filed a petition for divorce on the ground of cruelty. By his answer the husband denied that he had treated the wife with cruelty, and cross-petitioned for divorce, alleging desertion by her. The wife denied that she had

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deserted the husband and alleged that it was he who had deserted her; and she applied to the registrar for leave to file a second petition, based on that allegation of desertion, the statutory period of three years having meanwhile elapsed.

The registrar and, on appeal, Willmer J., refused to allow the second petition to be filed. The wife now appealed.

S. Lincoln for the wife. At the date of the petition by the wife in May, 1949, the only right of the wife to a decree was based on cruelty. At the time when the husband's answer was filed in November, 1949, the husband's right to petition for a decree on the ground of desertion had accrued. At this moment the wife's right to file a petition on the ground of desertion had also accrued. The wife, however, seeks the right to put on the file a further petition, alleging that there has accrued to her a right to say: "I want a decree of divorce, "as three years have now elapsed since the date of the "desertion": see Rayden on Divorce (5th ed.) p. 669.

The three-year period for desertion introduced by the Matrimonial Causes Act, 1937, has altered the whole position. [Counsel also referred to *Spawforth* v. *Spawforth* (1) and *Sandler* v. *Sandler* (2).] The question is referred to obiter by Lord Merriman, P. in *H.* v. *H.* (3). Counsel also referred to *Onslow* v. *Onslow* (4).] There is no rule as to the existence of two petitions on the file at the same time. This is an omission in the rules, which should be rectified. To refuse to allow the wife here to file a second petition would be a hardship on her.

Thomas Dewar for the husband. It is clear that no second petition should be filed. The whole machinery of r. 14 (3) of the Matrimonial Causes Rules, 1947, would be superfluous if it could be defeated by the issue of a second petition. [Counsel referred to ss. 32 and 103 of the Supreme Court of Judicature (Consolidation) Act, 1925.] Before January, 1950, two petitions could not have been allowed, because of *Story* v. *Story* (5).

Lincoln, in reply, referred to *Webb* v. *Webb* (6).

Asquith L.J. By a petition of May 26, 1949, the wife asked for a decree of dissolution on the sole ground of her

(1) [1946] P. 131.
(2) [1934] P. 149.
(3) [1938] W. N. 273.
(4) (1889) 60 L. T. 680.
(5) (1832) 3 Hag. Ecc. 738, 741.
(6) (1828) 1 Hag. Ecc. 349.

husband's cruelty; desertion was indeed mentioned in the petition, but not as a substantive ground for divorce, since it was not alleged, and could not be alleged, it not being the fact that the husband had deserted the wife for a period of at least three years immediately preceding the presentation of the petition.

The separation which might have been relied on as desertion by the husband took place at the end of July, 1946. The petition, be it noted, was lodged on May 26, 1949, a period of less than three years afterwards. If the wife had been well advised, it may well be that she would have waited until August, 1949, when she would have been in a position to allege desertion; but, having filed the petition in May, she did so prematurely so far as desertion is concerned.

The husband in his answer alleges both cruelty and desertion by the wife, the desertion being for a period of at least three years immediately preceding the presentation of the answer; and he prays the court to dismiss the wife's petition and grant him a decree.

The husband relies on a separation which he dates at about the same time as that referred to by the wife; but, since his answer was filed on November 22, 1949, if he can establish that the separation was a desertion he may well establish that she deserted him for a period of at least three years immediately preceding the presentation of the answer.

The wife, being unable to allege that three years had elapsed before the presentation of her petition, knowing that that cannot be remedied by a supplemental petition (see *Spawforth* v. *Spawforth* (1)), seeks to present a second petition, and now appeals against the refusal of the registrar and the judge to permit her to do so.

The ground of the judge's refusal is not stated, but it may be assumed that it is that there was already a petition on the file. There is no statutory provision, or rule in the Matrimonial Causes Rules, which provides that this cannot be done; but there is a very emphatic statement by Lord Merriman P. in *H.* v. *H.* (2). In that case, the facts of which bear little resemblance to the present case, the President uttered the general observation that by the established practice of the court it was impossible to have two petitions by a petitioner on the file in respect of the same marriage at the same time, and a fortiori when the two petitions were concerned with the

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(1) [1946] P. 131.
(2) [1938] W. N. 273.

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same subject-matter. This statement may well be obiter, but reported cases are exceedingly rare, and such as exist support the statement of Lord Merriman, P.

Text-books lay down the rule and cite in support *Onslow* v. *Onslow* (1). This passage appears there towards the end of the statement of facts; " During the hearing, however, it appeared " that the petitioner had, some years before, instituted " divorce proceedings against his wife, charging her with " adultery with a man named Clark, who was made " co-respondent in that suit. That case was not heard, " owing, it was said, to some mistake as to the date, and it " was called on in due course, and was struck out. No applica- " tion had ever been made to reinstate it in the list, or to have " it dismissed, and it still remained on the files of the court. " Counsel thereupon asked that that suit be now dismissed. " Butt, J. doubted the power of the court to do that. Steps " must be taken in the proper way—by summons—to get rid " of the first suit. Until that was done no decree could be " pronounced in the present suit. This unhappy petitioner " had been so bandied about that, solely on his account, and " in order to save him further expense in the matter, the " court would consent to hear the evidence now. It must, " however, be understood that steps should be at once taken " on behalf of the petitioner to have the former suit called on " and dismissed. Until that had been done the decree would " be suspended."

On behalf of the husband Mr. Dewar led us through a labyrinth of rules, going back to 1865 or earlier. He conscientiously explored the whole subject, but for the most part he drew a series of blanks: rules or statutory provisions referred to other rules which, when examined, were silent on the crucial point.

As Lord Merriman, P. said, there is a long standing-practice fortified by *Onslow* v. *Onslow* (2) that a second petition cannot be presented whilst a first is still on the file; such a thing is without precedent. I do not see why in the present case the enforcement of this rule should cause great hardship. On the trial of the first petition and the answer, if the wife can show that the separation in the summer of 1946 was a desertion by the husband, she can defeat his claim and, although she herself cannot obtain a decree for desertion, she can, if and when the first petition has been disposed of in her favour, file a second petition and allege desertion as a ground for the granting of a decree to herself.

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(1) 60 L. T. 680.

For these reasons the appeal should be dismissed.

JENKINS L.J. I agree. The court is being asked to make a departure from a long-established practice; and applications of that sort are necessarily viewed with a critical eye. If the court found a practice for which it was difficult to account, which had no positive warrant in any statute or rule, it would be disposed, in a case in which adherence to the practice might mean a denial of justice, to find a way out of the difficulty facing the litigant.

I agree that in the present case there is no real ground for supposing that any hardship will result if the wife is refused leave to file a second petition. All the issues are before the court in the existing proceedings. Should the matter be decided on the issue of cruelty one way or the other, then cadit quæstio; should it be found that the wife has deserted the husband, then again cadit quæstio. On the other hand, should the wife's defence to the husband's plea of desertion on the ground that it was he who deserted her succeed, then it is reasonably plain that, at that stage, she could file her further petition, which the husband would then hardly be able to oppose.

So far as I am able to judge, it may well be that there is good reason behind the practice, especially when one applies it to the ground for dissolution of marriage consisting of three years' desertion preceding the date of the petition. If a general practice grew up under which a second petition could be filed while the first was still pending, I am not satisfied that the effect might not well be to abridge the statutory period now required to make desertion a sufficient cause. A wife might, for example, after saying that she had been deserted by her husband for a period of less than three years, file a petition making out a flimsy case of cruelty. Then, if, on the eve of the hearing of that petition, the three years would have run out, it would, under the practice which we are asked to introduce, be open to the wife to file a further petition alleging desertion and then to proceed to consolidate it with the old one on the ground that the two matters should be heard together. Though technically the second petition would be a separate and independent proceeding, in substance the result would be very much the same as if the petitioner

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were allowed in a supplemental petition to allege and rely on desertion which had not lasted for the full three years at the date of the presentation of the original petition.

In view of the long-established practice, in view of the fact that adherence to it here will not work, as far as I can see, any hardship on the wife petitioner, and in view also of my doubt whether there might not be a solid reason of the kind I have mentioned in favour of adherence to the practice, I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *William P. Webb; J. A. H. Powell, Law Society, Services Divorce Department (Civil Section).*

J. L. D.

1950
May 10.

Willmer J.

SOCIÉTÉ DUNKERQUOISE DE REMORQUAGE ET DE SAUVETAGE *v.* OWNERS OF THE SHIP ATLANTIC SCOUT, HER CARGO AND FREIGHT.

THE ATLANTIC SCOUT.

Shipping—Limitation—Salvage—Services rendered by French salvors before France enemy-occupied—Inability of salvors to prosecute claim—Cessation of occupation by enemy—Whether claim statute-barred—Maritime Conventions Act, 1911 (1 *&* 2 *Geo.* 5 *c.* 57), *s.*8*—Limitation (Enemies and War Prisoners) Act,* 1945 (8 *&* 9 *Geo.* 6 *c.* 16), *s.* 1, *sub-s.* 1*—Trading with the Enemy Act,* 1939 (2 *&* 3 *Geo.* 6 *c.* 89), *s.* 2.*—St. R. & O.* 1943, *No.* 1034, *art.* 6 (1).

On February 24, 1950, the plaintiffs, a French company, issued a writ against the owners of an English vessel claiming remuneration for salvage services rendered to that vessel in January, 1940. In June of that year France was occupied by the enemy and it became illegal for the salvors to take proceedings against the owners of the vessel. Apart from any question arising out of the state of war from 1939–1945, the period allowed by the Maritime Conventions Act, 1911, for bringing an action was two years,

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subject to the right of the court to extend the time in special circumstances. By the Limitation (Enemies and War Prisoners) Act, 1945, that period was deemed not to run from the time when a necessary party to an action was an enemy or was detained in enemy territory until he ceased to be so, and for twelve months afterwards. On October 13, 1944, His Majesty's Government recognized the Government of France established under General de Gaulle, and by virtue of St. R. & O. 1945, No. 346, removing, as regards France, restrictions imposed by s. 1 of the Trading with the Enemy Act, 1939, the right of French subjects to sue in the courts of that country was restored. From the date of the salvage services to the date of the issue of the writ a period of about ten years had elapsed, and the shipowners contended that the action was not maintainable because statute-barred, and that the writ should be set aside. The French salvors contended that the remainder of the statutory period had not yet begun to run against them because no certificate by the Board of Trade declaring that France had ceased to be enemy territory had yet been issued as required by St. R. & O. No. 1034 of 1943, made under the Defence (Trading with the Enemy) Regulations, 1940.

Held, that, as, by virtue of s. 2, sub-s. 1, of the Limitation (Enemies and War Prisoners) Act, 1945, which created a new definition of "enemy territory," as meaning any area which, by virtue of the Defence (Trading with the Enemy) Regulations, 1940, or any order made thereunder, was treated for any of the purposes of the Act of 1945 as enemy territory, France was enemy territory and the salvors were resident there, therefore, in the absence of a certificate by the Board of Trade under art. 6 (1) of the Order of 1943 declaring that France had ceased to be enemy territory, the period of limitation of action had not again begun to run against the plaintiffs, and no order would be made to set aside the writ, even though at common law and for the purposes of the Trading with the Enemy Act, 1939, they were no longer enemies and were free to bring an action here.

MOTION to set aside a writ.

In January, 1940, the plaintiffs, the Société Dunkerquoise de Remorquage et de Sauvetage, a French company, rendered salvage services to the British steamship *Atlantic Scout* near Dunkirk. No proceedings were then taken by the plaintiffs against the owners of the *Atlantic Scout* in respect of their claim for remuneration, and in June of that year France became occupied by the enemy, when it became illegal for the salvors to proceed at all in any claim. At that time, some five months of the time allowed under the Maritime Conventions Act, 1911, for the bringing of an action had run, and the time was suspended. On October 13, 1944, His Majesty's Government recognized the Government of France established under General de Gaulle. The Limitation (Enemies and War Prisoners) Act, 1945, (1) provides that the period for bringing an action is to be deemed not to have run from the time when a necessary party to an action became an enemy or was detained in enemy territory until he ceased to be so, and for twelve months afterwards.

The writ in the action was not issued until February 24, 1950, when the defendant shipowners moved that it should be set aside on the ground that the action was statute-barred.

Vere Hunt for the shipowners. Time began to run against the plaintiffs in 1940, was suspended until 1944, and then again began to run. On any view of the facts, the time allowed has expired, the action is not maintainable, being statute-barred, and the writ should be set aside.

H. V. Brandon for the salvors. Reliance is placed on s. 2, sub-s. 1 (*c*) of the Act of 1945 (1), which defines the word "enemy," and on the construction of s. 2 of the Trading with the Enemy Act, 1939 (2). The effect of those enactments and of art. 6 (1) of St. R. & O., 1943, No. 1034 (3), made under

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(1) Limitation (Enemies and War Prisoners) Act, 1945, s. 1, sub-s. 1: "If at any time before "the expiration of the period "prescribed by any statute of "limitation for the bringing of "any action any person who "would have been a necessary "party to that action if it had then "been brought was an enemy or "was detained in enemy territory, "the said period shall be deemed "not to have run while the said "person was an enemy or was so "detained, and shall in no case "expire before the end of twelve "months from the date when he "ceased to be an enemy or to be "so detained, or from the date of "the passing of this Act, which-"ever is the later."

Section 2 sub-s. 1: "'enemy' "means any person who is, or "is deemed to be an enemy "for any of the purposes of "the Trading with the Enemy "Act, 1939, except that in "ascertaining whether a person is "such an enemy the expression "'enemy territory' in section two "of the said Act shall have the "meaning assigned to that expres-"sion by this section; . . . . 'enemy "'territory' means:—(*c*) any area "which, by virtue of reg. 6 . . . . "of the Defence (Trading with "the Enemy) Regulations, 1940, "or any order made thereunder, "is treated for any of the pur-"poses of the said Act as enemy "territory as so defined . . . ."

(2) Trading with the Enemy Act, 1939, s. 2, sub-s. 2: "The "Board of Trade may by order "direct that any person specified "in the order shall, for the pur-"poses of this Act, be deemed to "be, while so specified, an enemy."

(3) St. R. & O. 1943, No. 1034, art. 6 (1): "Where, after the "coming into force of this regula-"tion, any area ceases to be "enemy territory as defined in "the principal Act (whether by

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the Act of 1939, is that time has not begun to run again against the salvors, and that they are still, technically, enemies for the purposes of the Act of 1945. They will continue to have that status until the Board of Trade issue a certificate declaring France to have ceased to be enemy territory, when the remainder of the period of limitation will begin to run. The Board of Trade have not made that declaration in respect of the French Republic, but they have issued certificates in respect of other European countries. It is not suggested that these French salvors are still enemies at common law, or for any other purpose under the Trading with the Enemy Act, 1939; but, as the matter stands at present, no order ought to be made to set aside the writ because time has never begun running again against the salvors.

Hunt in reply. The overall period must be considered from the date of the casualty until the present time. It is said on behalf of the salvors that they are still "enemies" only in so far as their claim for salvage is concerned, and that that condition will continue for the remainder of the ordinary statutory period of limitation after the Board of Trade have issued the certificate under Order No. 1,034. That highly technical argument will not do. The salvors cannot be entitled to come to this court and allege for one purpose that they are "enemies" and at the same time seek to obtain remedies on the ground that they are not "enemies" for their present purpose. If their first contention is right, then they have no business to be suing in His Majesty's courts at all.

Willmer J. [after stating the facts] The question turns on the true construction of the Limitation (Enemies and War Prisoners) Act, 1945, on which the plaintiffs rely. Section 1, sub-s. 1 is the operative provision. [His Lordship read it.]

On behalf of the salvors it is contended that on the occupation of France by the German forces the period provided for by the Maritime Conventions Act, 1911, ceased to run against them,

"reason of the occupation thereof "by His Majesty or a Power "allied with His Majesty, or by "reason of its no longer being in "the occupation of a Power with "whom His Majesty is at war, or "for any other reason), that area "shall, for the purposes of ss. 3 "(*a*), 4, 5 and 7 of the principal "Act . . . . and, save as ex-"pressly provided by any such "order for the purposes of any "order, made under the said "s. 7, be treated as if, until such "time as the Board of Trade may "by order specify, there had been "no such cessation."

and it is said that for certain technical reasons time has not yet begun to run again against them. If that is right then clearly this action cannot be halted in limine. Moreover, even after the moment when time will begin to run again, the salvors, according to that argument, will still have a further period of something like a year and seven months to run before it can be said that the action is statute-barred.

It is argued that the salvors are, for the purposes of the Act of 1945, an enemy,—that is to say, for the purpose of preventing the running of time they still continue to be technically an enemy. That contention must depend on the definition of " enemy " which is contained in the statute itself. Section 2 refers to the definition contained in the Trading with the Enemy Act, 1939, but adds these significant words : " . . . . except that in ascertaining whether a person is such " an enemy the expression ' enemy territory ' in s. 2 of the " said Act " (the Act of 1939) " shall have the meaning assigned " to that expression by this section."

Therefore I must turn to the Act of 1939 to see what the definition of " enemy " is. It is in s. 2, which includes four classes of persons as " enemies," two of which are material for present purposes : " (*b*) any individual resident in enemy " territory," and (*c*) " any body of persons (whether corporate " or incorporate) carrying on business in any place, if and so " long as the body is controlled by a person who, under this " section, is an enemy." An affidavit before me shows that the salvors are a body corporate, controlled by persons who are resident in France.

The question, therefore, arises : is France " enemy " territory " within the meaning of the Act of 1945, which, as already pointed out, creates a new definition of " enemy " territory," and specifies that in determining the meaning of " enemy " that new definition of " enemy territory " has to be taken into consideration. By s. 2, sub-s. 1 (*c*) of the Act of 1945, " enemy territory " means " any area which, by virtue " of reg. 6 or reg. 7 of the Defence (Trading with the Enemy) " Regulations, 1940, or any order made thereunder, is treated " for any of the purposes of the said Act as enemy territory as " so defined."

I have been referred to an Order No. 1034 of 1943, which is an Order in Council amending the Defence (Trading with the Enemy) Regulations, 1940. [His Lordship read Art. 6 (1) of the Order of 1943, and continued :]

It is not disputed that the Board of Trade have never by Order specified the cessation of that provision, although cessation orders have in practice been made in the case of a number of other European countries; and I was shown examples of typical orders which have been made. The information before me is, however, that no such cessation order has ever been made in respect of the Republic of France. It appears to me, therefore, that the effect of that regulation, when taken into consideration in relation to the definition of "enemy territory" contained in the Act of 1945, leads inevitably to the conclusion that, for some purposes, France remains "enemy territory" within the meaning of the Act of 1945.

If that is so, then the salvors' contention seems unavoidable, that, so long as that state of affairs persists, time is not running against them. It was submitted by counsel for the shipowners that that highly technical argument will not do because the salvors are not entitled to come to this court and allege for one purpose that they are "enemies" while pretending for other purposes that they are not "enemies." If, counsel says, the salvors are "enemies," they have no business to be suing in His Majesty's courts at all, and the argument presented on their behalf ought not to be entertained. That contention is very attractive, because, as counsel points out, the object of the legislature in enacting the Limitation (Enemies and War Prisoners) Act, 1945, was to protect persons who, for one reason or another on account of the war, e.g., by becoming enemies or by being detained by enemies, were unable to prosecute their rights during the continuance of that disability. But it is suggested that the moment an ex-enemy, or a person who was detained by enemies, or any person who is covered by the Act of 1945, recovers the ability to prosecute his claim in these courts the whole reason for his protection disappears. On that ground counsel for the shipowners claims that the salvors cannot be heard to say that for one purpose they are "enemies" and for another that they are not.

Attractive as that argument is, I do not see my way to accept it, for this reason: the salvors have, in fact, a perfectly good legal right now, in 1950, to sue in this court. They are no longer "enemies" at common law, whatever their position may have been during the war; nor do they commit any offence against the Trading with the Enemy Act, 1939, by instituting proceedings in this court: their right to do so was

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restored by St. R. & O. 1945, No. 346. That Order, so far as France is concerned, removed the restrictions imposed by s. 1 of the Trading with the Enemy Act, 1939, and, as I see it, from that time onwards a Frenchman was entitled to sue in the courts of this country. So far as I know, there is now no reason, either at common law or by statutory enactment, why a citizen of France should not prosecute any claim which he has in the courts of this country. I cannot, therefore, accept the contentions urged on behalf of the shipowners.

The result seems to be very surprising, for the present plaintiffs are placed in a specially privileged position. Unlike other claimants they appear to enjoy the right to bring an action in these courts at any time, now or in the future, without any question of time running against them being allowed to arise—and, if that conclusion is right, that state of affairs will apparently continue for a period even after the moment when the running of time again begins.

In these circumstances, it appears to me that it is impossible to say that the writ in this action should be set aside or that any order should be made halting the proceedings in limine. The motion on behalf of the defendants must therefore fail.

Motion dismissed

Solicitors: *Clyde & Co.; Stocken, May, Sykes & Dearman.*

H. G.

END OF VOL. AND OF PROBATE SERIES FOR 1950.

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